93-420

SUPREME COURT, U.S.
FILED
SEP 13 1993

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ISAIAH GREEN, JR.,
Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Fourth Circuit's upholding of summary judgment -- which disregarded race discrimination findings on the same issue by an administrative law judge, a state agency and a superior court -- undercut the policy of federal and state governments, not to mention this Court, to construct and enhance state administrative schemes to help eliminate employment discrimination?

2. Is the Fourth Circuit's slight of findings of race discrimination by a North Carolina administrative law judge after a due process hearing and by a state Superior Court judge who reviewed the hearing's transcript and evidence, inconsistent with 28 U.S.C. 1738, other Circuits, and decisions of this Court?

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IN THE SUPREME COURT OF THE UNITED STATES
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ISAIAH GREEN, JR.,
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v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Isaiah Green, Jr. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court's summary judgment against him.

OPINIONS BELOW

The opinion of the Court of Appeals

for the Fourth Circuit is unpublished, and is reprinted in the appendix, p. 1a, infra.

The memorandum opinion and order of the United States District Court for the Middle District of North Carolina is unpublished and is reprinted in the appendix, p. 3a, infra.

Relevant decisions of the Wake County Superior Court, the North Carolina State Personnel Commission and the North Carolina Office of Administrative Hearings are also attached hereto, beginning at p. 31a, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1993. The Court denied a timely petition for rehearing on June 14, 1993.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

~~28 U.S~~.C. §1738. State and Territorial statutes and judicial proceedings; full faith and credit.

42 U.S.C. §2000e et seq.. Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972.

North Carolina General Statutes 150B "The Administrative Procedures Act.

STATEMENT OF THE CASE

Petitioner is an African-American nine-year veteran of the North Carolina Highway Patrol who attained the rank of Master Trooper. In 1981 he transferred to the enforcement section of the North Carolina Department of Transportation, Division of Motor Vehicles. Petitioner was given an assignment in Hillsborough, North Carolina. He requested a transfer to the Department's Raleigh office. In

1985 Petitioner was promoted to the rank of Law Enforcement Officer I (LEO I) and transferred to Rocky Mount, North Carolina. Then he again requested a transfer to the Raleigh office. Approximately a year later, Respondent hired a white male to fill an LEO I position in Raleigh. Petitioner filed an administrative complaint alleging racial discrimination in denying his transfer, and hiring a white applicant, Off. Bristle, from outside the agency. His complaint was heard by an Administrative Law Judge (ALJ) in the Office of Administrative Hearings, which had just been established by the North Carolina legislature in 1985 to provide full due process hearings for state employee discrimination claims, among other disputes.

The ALJ found that the Department of Transportation's:

> "stated reasons [for hiring a white LEO, instead of transferring Mr. Green] were, in fact, a pretext for discrimination. Director Stahl [of the Department of Transportation] testified that of 114 LEO I's across North Carolina, only 5 or 6 are Black. He also stated that of 10 positions filled at the time of Bristle's, 8 were White Males, 1 White Female, 1 Black Female in an entry-level position for which Petitioner was not considered, and no Black Males. Also, no Black Male has ever filled a LEO I position in Wake County."

The ALJ found that the Department of Transportation had "not clearly articulated legitimate nondiscriminatory reasons for its denial of Petitioner's request for a lateral transfer to Wake County" and that "[e]ven if one were to conclude that Respondent has clearly articulated legitimate nondiscriminatory reasons for its action, it is concluded that the Petitioner has shown that the stated reasons were, in fact, a pretext

for discrimination" (44a-45a). These findings were affirmed by the North Carolina State Personnel Commission at its December, 1986 meeting (35a) and by the Wake County Superior Court Judge, denying the Department of Transportation appeal, in August, 1988 (31a).

After the 1986 hearing, a continuing pattern of allegedly racially motivated actions were taken by Respondent toward Petitioner, allegedly triggered by his challenge to the hiring of Off. Bristle, and aggravated by Petitioner's success in his administrative appeals. Petitioner chose a federal forum and Title VII to fully effectuate the earlier decision and to enjoin and remedy the continuing retaliation and discrimination.

The present action, instituted after EEOC had failed to find cause, was filed in the United States District Court for

the Middle District of North Carolina. The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e et seq., and under 28 U.S.C. §1331 (general federal question jurisdiction). The complaint alleged that the Petitioner was the victim of racially discriminatory pay raises, hiring practices, and transfer policies.

After discovery, the Department of Transportation moved for Summary Judgment. In response, Petitioner produced the ALJ's Findings of Fact from the Administrative Hearing (37a), the State Personnel Commission's Decision (35a) which upheld the ALJ's decision, and the Superior Court's decision (31a) which affirmed the two lower rulings of race discrimination in the hiring of the

white male for an LEO position in Wake County.

The Federal District Court Judge found "that the Department's proffered justification for choosing Bristle over plaintiff on this basis is valid, reasonable and does not give rise to an inference of discriminatory intent." (25a) The district court concluded that there was no genuine issue of fact and granted summary judgment.

Petitioner appealed pro se to the Fourth Circuit Court of Appeals, which affirmed the district court in a per curiam opinion, calling Petitioner's appeal "without merit."(4a)

REASONS FOR GRANTING THE WRIT

I. **The Fourth Circuit's upholding of the summary judgment, in the face of judicial findings of race discrimination on the same issue by three layers of state administrative and judicial appeals, raises troubling**

policy questions regarding the significance of state administrative schemes which this Court has consistently supported.

This Court, the Congress and State Governments have consistently, since the 1950s, supported the establishment and use of the adjudicatory powers of state administrative bodies. Grounded in this Court's highly evolved analysis of the constitutional protections of due process and equal protection, these state administrative adjudicatory processes, when functioning properly, provide a relatively efficient, informal and accessible method to resolve disputes between citizens and their governments. The development of administrative hearings, particularly in the area of employment discrimination, has established in many states a body of expertise and experience crucial to the

effective enforcement of equal employment legislation. Administrative hearings are an inexpensive alternative to formal litigation, and are often more open to the possibility of reconciliation.

The Office of Administrative Hearings (OAH) in North Carolina is an independent, quasi-judicial agency (N.C. G.S. 150B) established in 1985 to provide a source of independent Administrative Law Judges (ALJs) to hear administrative law contested cases. The OAH is also designated as a deferral agency of the Equal Employment Opportunity Commission, and one of its primary functions is the investigation and reconciliation of allegations of discrimination brought by state employees. If attempts at reconciliation in such cases fail, the OAH's Administrative Law Judges are empowered to grant relief in disputes

between state employees and their Agencies. As independent judicial officers working in the agency charged with the protection and enforcement of the civil rights of state employees, the ALJs are a particularly valuable resource when discrimination and due process questions are raised.

On November 27, 1985, the Department of Transportation (DOT) posted a position for LEO I in Wake County. Petitioner applied for a transfer to this position. He "was not interviewed. Wake County has never had a Black Male serve in a LEO I position. Of 114 LEO I positions in North Carolina, only 5 or 6 are filled by Blacks." (40a) A white male was hired to fill the position.

Before the establishment of the OAH, Petitioner's only options for a due process hearing to protest his allegedly

scriminatory treatment would have been
tle VII or a 42 U.S.C. §1983 complaint.
t, since the North Carolina legislature
d set up due process administrative
arings with trained law judges with
bpoena powers, sworn witnesses, and
corded testimony, Petitioner now had an
tractive third option.

Petitioner chose this new, less
rmal, less time-consuming, and less
pensive avenue. He filed an action in
e new OAH. The low number assigned his
se -- 86 OSP 22 -- indicates it was
ong the earliest to come before the
wly created Agency.

A few months later, on August 26, -
86, ALJ Fred Morrison took sworn
stimony, with attorneys representing
th the Petitioner and Respondent DOT.
e hearing offered both sides a full and
ir opportunity for confrontation, cross

examination and discovery. During this hearing, the DOT failed to present any college records or transcripts for Officer Bristle, the white candidate hired instead for the LEO position for which Petitioner applied. DOT had no witnesses testify as to how the hiring decision was made (44a).

Within two months, the ALJ filed his recommended decision: Petitioner had been discriminated against and should be granted a lateral transfer to Wake County (46a). This was upheld by the State Personnel Commission (SPC), adopting all of the essential findings and conclusions of the ALJ (35a). The DOT appealed to the Superior Court of Wake County (N.C.G.S. 150B-45) which upheld the ALJ's and the SPC's decision because they were "supported by substantial evidence." (31a)

The new administrative scheme worked. It was relatively quick. It provided a complete due process hearing, with discovery, sworn testimony, cross examination, a written record, and documentary evidence under the N. C. Rules of Evidence, and other constitutional protections.

The DOT had two opportunities to challenge the ALJ's decision: at the SPC and the Superior Court. It lost both.

When Petitioner believed that he was being retaliated and discriminated against, he filed a Title VII claim based on this same non-transfer and the retaliation which he believed he suffered because of his (successful) administrative case. The DOT was given a new bite at the apple. This time, before a Federal Judge who did not have the whole record before him, the DOT

successfully argued that the due process hearing and findings below were wrong, and that there was insufficient evidence from which to infer racially discriminatory motives in the hiring of the external white applicant over the internal transfer of the Black applicant.

The District Court agreed.

This cavalier disregard for the adjudicatory work of state judges by the federal bench violates the full faith and credit clause and basic principles of comity and federalism. Additionally, "stripping state court judgments of finality would be ... destructive to the quality of adjudication by lessening the incentive for full participation by the parties and for searching review by State officials." Kremer v. Chemical Construction Corp., 456 U.S. 461, 478 (1982). The Kremer majority recognized

that "state antidiscrimination laws ... play an integral role in the congressional [Title VII] scheme." Id. at 468.

Permitting federal judges to ignore that role reduces "the incentive for states to work toward effective and meaningful anti-discrimination systems." Id. at 478.

This Court defended the "detailed and well-crafted procedures for conciliation and resolution of Title VII claims." Patterson v. McLean Credit Union, 491 U.S. 164, 180 (1989). In Patterson, the Court lauded the administrative procedures built into Title VII and the potential for "conciliation rather than litigation" that such procedures afford. Id. The Court was concerned that allowing a petitioner to bring a quintessentially

Title VII claim under another federal statute would undermine the procedural mechanisms Congress specifically codified in Title VII. Allowing a federal judge to disregard the judicially affirmed results of complementary state administrative mechanisms is similarly destructive to the principles of Title VII this Court has sought to protect.

In University of Tennessee v. Elliott, 478 U.S. 788 (1986), this Court held that unreviewed state administrative proceeding have no preclusive effect in subsequent Title VII claims. This decision, when read in conjunction with Kremer, indicates a definitive federal policy of deferring to state agency decisions which are reviewed by state courts. Extending preclusive effect to such decisions is necessary if the goals and policies underlying Title VII and

state administrative policies are to have any significant meaning.

If a federal court can slight a state court's finding of race discrimination to summarily dismiss a claim based on the same issues, then there is no incentive for an employee to seek out or have confidence in the supposedly more expedient administrative remedies.

This undercuts all the efforts to simplify and expedite these cases. It complicates and delays justice. It tells litigants that administrative decisions, even when they are upheld by state court judges, are not worth the paper they are written on.

The Fourth Circuit's disregard of the state race discrimination findings here, undercut the policy of federal and state governments, not to mention this Court,

to construct and enhance state administrative schemes to help eliminate employment discrimination. The Court should grant this petition.

II. The Fourth Circuit's slight of findings of race discrimination by a North Carolina administrative law judge after a due process hearing and by a Superior Court judge who reviewed the hearing's transcript and evidence, is contrary to 28 U.S.C. 1738, and conflicts with decisions of other Circuits, and this Court.

The question of the proper preclusive effect to be given to state administrative proceedings was decided by the Court in Kremer v. Chemical Construction Corp. and University of Tennessee v. Elliott. In Kremer, after a thorough analysis of the legislative history of Title VII, the Court held that "since it is settled that decisions by the EEOC do not preclude a trial de novo in federal court, it is clear that

unreviewed administrative determinations by state agencies should not preclude such review...." 456 U.S. at 470, n. 7.

The Court elevated this footnote to a holding in Elliott, holding "that Congress did not intend unreviewed state administrative proceedings to have preclusive effect in Title VII claims." 478 U.S. at 796.

The teaching of both Kremer and Elliott is that in a Title VII action, a prior state decision enjoys preclusive effect only if it has been reviewed by a state court. Mr. Kremer and Mr. Elliott both received unfavorable decisions at the administrative level. Mr. Kremer unsuccessfully appealed the decision to the state courts, and hence his Title VII action was barred. Mr. Elliott chose not to appeal his case, and was thus entitled to de novo Title VII consideration.

Here, Respondent appealed the administrative decision to the state court. The state court reviewed the decision, and upheld the finding that Petitioner had been discriminated against by Respondent. In other words, Respondent lost.

The Fourth Circuit failed to comport with the holdings of this Court in these two cases, which required that Respondent was bound by the state judicial review which it sought.

Several circuits have interpreted this Court's analysis of reviewed administrative decisions and their preclusive effects on Title VII cases. In Bray v. New York Life Insurance, 851 F.2d 60 (2nd Cir. 1988), the Second Circuit relied on Kremer and Elliott to affirm the district court's dismissal to the petitioner's Title VII claim. Unlike

Mr. Elliott, Ms. Bray sought judicial review of her administrative hearing. Citing this as the critical factor in their decision, the court held that "once a plaintiff has entered the state court system, she is bound by the preclusion rules governing that system, and the federal courts must in turn respect the finality of the judgments that issue from the state court." Id. at 64.

The Seventh Circuit has similarly adopted the Kremer and Elliott analysis, concluding that "when a state court judgment has been rendered in a state whose laws would give the judgment preclusive effect, the Supreme Court has held section 1738 applicable to preclude claims under ... Title VII." Welch v. Johnson, 907 F.2d 714, 719 (7th Cir. 1990). The court held that the proper issue before it, in a case in which an

administrative decision has been appealed to the state court, is the scope of the state's res judicata doctrine.

The Third Circuit reached an identical conclusion in Rider v. Commonwealth of PA., 850 F.2d 982 (3rd Cir. 1988).

No such issue was ever considered in the summary judgment order entered in the instant case however. The district judge examined the prior, judicially affirmed finding of discrimination and, instead of granting it preclusive effect, concluded that "plaintiff cannot establish a prima facie case ... of discrimination." (25a) The Fourth Circuit upheld this negligent determination.

In McInnes v. State of California, 943 F.2d 1088 (9th Cir. 1991), the Ninth Circuit carefully studied the functions of the State Personnel Board to determine

whether it was a "court" whose decisions are entitled to preclusive effect under §1738. Concluding it was in fact only an administrative agency, the court of appeals relied on Elliott to reverse the district court's entry of summary judgment on behalf of the appellees. "Elliott establishes a bright-line rule that an administrative determination is entitled to preclusive effect in a subsequent Title VII action only if it has been reviewed by a court." Id. at 1095.

The preclusive effect of reviewed administrative decision envisioned by this Court and the four circuit courts cited should, at a minimum, be sufficient to meet the summary judgment standard in subsequent Title VII proceedings.

The Fourth Circuit has only considered this Court's decisions in

Kremer and Elliott in the §1983 context. In that context, it has accepted the Court's ruling that a state administrative agency acting in a judicial capacity is entitled to the same preclusive effect in federal court as it is given in state court. Layne v. Campbell County Dept. of Social Services, 939 F.2d 217, 220 (4th Cir. 1991), O'Reilly v. County Board of Appeals, 900 F.2d 789, 791 (4th Cir. 1990).

The Fourth Circuit's only references to preclusion in the Title VII context are vague and oblique asides. In a footnote in Layne, the court notes that the Supreme Court has "applied this preclusive effect test to the ... Reconstruction civil rights statutes, but not to ... Title VII claim ...." 939 F.2d at 219 n. 7. In Crowley v. Prince George's County, MD., 890 F.2d 683 (4th

Cir. 1989), the court applied this "preclusive effect" test-- established by this Court for §1983 actions only-- to a Title VII claim. It held that because the Maryland courts "would not accord preclusive effect to the findings of the personnel board," such findings should have no bearing in the Title VII action. Id. at 688.

The Fourth Circuit fundamentally misconstrues the meaning of Kremer and Elliott, which provide that judicially reviewed administrative decisions are entitled to preclusive effect in Title VII actions; unreviewed ones are not.

If the Fourth Circuit were to consistently apply its "preclusive effects" test, as it purported to do in Crowley, an "unreviewed" decision of the Office of Administrative Hearings would invariably pass that test and be accorded

full preclusive effect.

This Court, the Fourth Circuit notwithstanding, has limited the use of the "preclusive effects" test solely to §1983 actions. The Supreme Court has adopted the bright-line, judicial review analysis of Elliott for Title VII actions.

The Fourth Circuit, in conflict with this Court and the other circuits cited, has failed to adopt and enforce these holdings. In view of this clear conflict, the Court should grant this petition to resolve this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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(919) 968-1278
Counsel for Petitioner

Dated: Chapel Hill, NC
September 12, 1993

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APPENDIX

F I L E C O P Y
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED

June 14, 1993

No. 92-1933
CA-90-289-2

ISAIAH GREEN, JR.
Plaintiff - Appellant

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Division of Motor Vehicles

Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition

for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ISAIAH GREEN, JR.
Plaintiff - Appellant

v. No. 92-1933

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Division of Motor Vehicles
Defendant - Appellee

Appeal from the United States District Court for the Middle District of North Carolina at Raleigh. Hiram H. Ward, District Judge.
(CA-90-289-2)

Submitted: March 16, 1993

Decided: May 18, 1993

Before PHILLIPS, NIEMEYER, and HAMILTON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Isaiah Green, Jr., Appellant Pro Se.
Harold Franklin Askins, Assistant Attorney General, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Isaiah Green, Jr., appeals from the district court's order denying him relief under 42 U.S.C. §§ 2000e - 2000e-17 (Title VII) in case number 92-1933. Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. Green v. North Carolina Department of Transportation, No. CA-90-289-2 (M.D.N.C. July 21, 1992).

No. 92-1933 AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

ISAIAH GREEN, JR., Plaintiff	:	
v.	:	No. 2:90CV289
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES, Defendant	:	

MEMORANDUM OPINION AND ORDER

WARD, Senior Judge

This matter comes before the Court on defendant's Motion to Dismiss for lack of subject matter jurisdiction and defendant's Motion for Summary Judgment due to an absence of factual bases to support plaintiff's claims. For the reasons stated herein, the Court will deny defendant's Motion to Dismiss, but will grant defendant's Motion for Summary Judgment.

I.

The relevant facts of this case are as follows. On June 15, 1981, plaintiff, Isaiah Green, Jr., voluntarily transferred from his position with the North Carolina Highway Patrol ("Patrol") to the Enforcement Section of the North Carolina Department of Transportation, Department of Motor Vehicles ("Department"). At the time of the transfer, plaintiff had served nine years with the Patrol and had attained the rank of Master Trooper. As a Master Trooper, the Patrol compensated plaintiff at a pay grade of sixty-nine which equated to a salary of approximately $18,500 per year. In his new position of Vehicle Inspection Officer ("VIO"), Plaintiff's pay grade dropped to sixty-one with a corresponding salary of $15,540. A pay grade of sixty-one

represented the top of the pay scale for the VIO position, and the Department placed plaintiff at this level pursuant to State personnel policy. Plaintiff's initial assignment as a VIO was in Hillsborough, North Carolina. Plaintiff immediately requested a transfer to Raleigh, North Carolina.

On January 1, 1985, the Department promoted plaintiff to the position of Law Enforcement Officer I ("LEO I") with a pay grade of sixty-nine and transferred plaintiff to Rocky Mount, North Carolina. As a result, plaintiff's salary increased to $22,572, the maximum allowed under State personnel guidelines. Again, plaintiff requested a transfer to the Department's Raleigh office.

On February 1, 1986, the Department hired Emanuel Bristle ("Bristle") to fill an LEO I position in Raleigh. Bristle

was a white male who had not been previously employed by the State. Bristle came to this post with a Bachelor's degree and Master of Arts degree in criminal justice and twelve years of law enforcement experience

On March 4, 1986, pursuant to N.C. Gen. Stat. § 150B-23 (1983), plaintiff filed a petition with the North Carolina Office of Administrative Hearings where he alleged that the Department was guilty of racial discrimination in that the Department had hired Bristle for the above mentioned position instead of honoring plaintiff's request for a transfer to Raleigh. After conducting a hearing, the Office of Administrative Hearings issued a decision in favor of plaintiff.

On April 29, 1986, plaintiff also filed a complaint with the

Equal Employment Opportunity Commission ("EEOC") alleging racial discrimination due to Bristle's hiring. However, unlike the State's Office of Administrative Hearings, the EEOC determined that there was no just cause for the charge.

On October 8, 1986, the Department hired Ronald Reams for an LEO I position in Raleigh. Again, plaintiff filed a petition in the Office of Administrative Hearings and with the EEOC alleging racial discrimination. These petitions were dismissed.

In March 1988 the Department offered plaintiff a transfer to an LEO I position in Raleigh. Plaintiff refused this transfer stating that the position was that of an undercover inspector which, according to plaintiff, was a low status position historically held by "rookies."

On October 27, 1988, plaintiff filed another charge of race discrimination with the EEOC alleging that the Department had wrongfully denied him a lateral transfer to Raleigh on October 17, 1988. This charge apparently arose out of the switching of job assignments by two LEO I's already stationed in Raleigh which plaintiff perceived as creating a new LEO I position in that office. After investigating, the EEOC issued a no just cause finding.

On January 30, 1990, plaintiff filed yet another EEOC complaint alleging race discrimination and retaliation regarding the pay of a newly hired LEO I and the reclassification of a second LEO I. The EEOC made a finding of no just cause and plaintiff filed a complaint in the United States District Court for the Eastern District of North Carolina. Soon

thereafter, plaintiff voluntarily dismissed the action.

On April 10, 1990, the Department notified plaintiff that he was to transfer to an LEO I position in Raleigh effective May 1, 1990. Plaintiff accepted this transfer and remains in this position today.

In his complaint, plaintiff alleges that the Department violated 42 U.S.C. § 1981 (1988), 42 U.S.C. § 1983 (1988) and 42 U.S.C. 2000e et sec. (1988) ("Title VII"). Further, plaintiff maintains that the Department is liable under a State common law claim of intentional infliction of mental anguish. However, in his response to defendant's Motion to Dismiss and Motion for Summary Judgment, plaintiff abandoned his claims under 42 U.S.C. §§ 1981 and 1983 as well as his State common law claim. Therefore,

plaintiff's Title VII claim is the sole remaining cause of action with any potential viability.

Defendant maintains that the Court does not have subject matter jurisdiction over any of plaintiff's claims. However, it is clear that pursuant to 28 U.S.C. § 1331 (1988), which governs federal question jurisdiction, such is not the case with regard to plaintiff's Title VII claim. Accordingly, the Court will address the merits of plaintiff's Title VII claim below.

II.

Plaintiff argues that there are three circumstances where the Department's actions have resulted in Title VII violations. First, plaintiff alleges that the Department violated Title VII prohibitions in its treatment of him and other black members of the

Department with regard to merit raises. Second, plaintiff asserts that the Department treated him and other black members of the Department unfairly in its hiring practices. Finally, plaintiff maintains that the Department refused his requests for lateral transfers to Raleigh because of his race and in retaliation for previously filed EEOC complaints. The Court will deal with each of plaintiff's allegations in turn.

III.

A moving party is entitled summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure where he shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ. P. 56(c). In the instant case, defendant has moved for summary judgment. As no unsettled issues

of material fact exist, defendant's Motion for Summary Judgment will be granted.

A. Title VII

Title VII provides, in pertinent part, that:

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color,

> religion, sex, or national origin.

42 U.S.C. 2000e-2(a) (1988).

In Title VII cases involving allegations of disparate treatment, such as the instant case, a plaintiff must prove intentional racial discrimination. Autry v. North Carolina Dept. of Human Resources, 820 F.2d 1384, 1385 (4th Cir. 1987). A plaintiff bears the initial burden of proving, by a preponderance of the evidence, a prima facie case of discrimination. See Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989). To satisfy this requirement, a plaintiff need only raise an inference that a defendant acted with discriminatory intent. Moore v. Charlotte, 754 F.2d 1100, 1105 (4th Cir.), cert. denied, 472 U.S. 1021 (1985), by eliminating the most common nondiscriminatory reasons for the

plaintiff's rejection. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); see also, Moore, 754 F.2d at 1105. Additionally, a Prima facie case of race discrimination under Title VII requires a plaintiff to demonstrate a nexus between the race of the complainant and the particular employment decision being challenged. Autry, 820 F.2d at 1385.[1]

---

[1] The Supreme Court set forth the most common method of establishing a prima facie case of race discrimination under Title VII stating that a plaintiff may show:

> (i) that he belongs to a [protected] minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the plaintiff's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

If a plaintiff overcomes this burden, the defendant must then articulate a legitimate, nondiscriminatory reason underlying the employment decision in question. Burdine, 450 U.S. at 254; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If the defendant is able to advance a legitimate, nondiscriminatory reason for the action complained of, the burden shifts back to the plaintiff who then has the "ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." Burdine, 450 U.S. at 256. The plaintiff may meet this burden in either of two ways: "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered

explanation is unworthy of credence." Id.

1. *Plaintiff's Merit Raise Claim*

As stated above, plaintiff alleges that the Department engaged in discriminatory practices with regard to merit salary increases given in 1986. Specifically, plaintiff contends that, despite an "acceptable" performance rating, the Department denied him a merit pay increase in 1986 when "all" the white employees in the Department's Greensboro, North Carolina facility received such an increase. (Deposition of Isaiah Green, Jr., June 21, 1991, at 13-25 [hereinafter Green Deposition]). Further, plaintiff maintains that the only other black employee reporting to the Greensboro office received a lesser merit pay increase than did his

non-minority counterparts. Id. at 16. Simply put, there is no basis in fact for plaintiff's allegations.

It is State policy that not all employees who are eligible for a merit increase by virtue of an "acceptable" performance rating receive such an increase. The Court finds this policy to be valid based upon the State's limited resource base. Accordingly, it would not be discriminatory to deny some employees a merit increase while other similarly situated employees received such an increase unless the decision as to who received the merit increases was based upon prohibited criteria such as race, sex or national origin. Such is clearly not the case here.

First, plaintiff's contention that "all" the non-minority employees reporting to the Department's Greensboro

facility received merit increases is inaccurate. While it is true that plaintiff's performance rating was "acceptable" and that he did not receive a merit increase in 1986, at least two non-minority employees in the Greensboro office, Gary Wayne Tutterow and Robert Eugene Mann, did not receive increases either, notwithstanding their "acceptable" performance ratings.

Second, plaintiff asserts that the other black employee, Alfonzo Everette, reporting to the Greensboro office received a lesser increase than his non-minority counterparts. However, as stated above, neither Mr. Tutterow nor Mr. Mann, both non-minority employees, received a merit increase of any kind. Thus, any merit increase received by Mr. Everette, regardless of its amount, was greater than that received by Mr.

Tutterow and Mr. Mann. This fact clearly undermines plaintiff's assertion that the Department discriminated on the basis of race in awarding merit increases in 1986. Therefore, the Court finds that plaintiff's claim must fail.

2. Plaintiff's Unfair Hiring Practices Claim

Plaintiff also maintains that the Department engaged in unfair hiring practices relating to plaintiff's starting salary with the Department. According to plaintiff, the Department required plaintiff to accept a decrease in pay upon accepting his VIO position in 1981 while it did not require a non-minority employee to take such a reduction. (Green Deposition at 25-32). This claim is totally unsupported by the evidence plaintiff presents.

In 1981 plaintiff voluntarily

transferred from the Patrol to the Department. In so doing, plaintiff voluntarily took a demotion from Master Trooper to VIO. As a Master Trooper, the Patrol compensated plaintiff at a pay grade of sixty-nine which equated to a salary of approximately $18,500 per year. In his new VIO position, plaintiff's pay grade dropped to sixty-one with a salary of $15,540. However, a pay grade of sixty-one represented the top of the pay scale for the VIO position and the Department placed plaintiff at this level pursuant to State personnel policy. Additionally, plaintiff has received significant pay increases throughout his tenure with the Department and his salary continually ranks at the high end of the allowable compensation scale. Again, plaintiff presents no evidence establishing a prima facie case of

discrimination under Title VII.

3. Plaintiff's Failure to Transfer Claims

It is difficult to discern from plaintiff's pleadings the factual bases of plaintiff's Title VII claims as they relate to his being denied requested transfers to the Department's Raleigh office. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss and for Summary Judgment gives a cryptic recitation of the relevant facts and is conspicuously lacking in authority supporting plaintiff's position.

In any event, a review of the evidence reveals that plaintiff's claim appears to be founded on three instances of alleged discrimination: (1) the Department's hiring of Bristle to fill a newly created LEO I position for the Emissions Inspection Program in Raleigh

in February 1986 (Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss and For Summary Judgment at 5); (2) the Department's hiring of Reams to fill an existing LEO I position in Raleigh in October 1986; and (3) the Department's administrative change in the Raleigh office in October 1988 which plaintiff declares created a new LEO I position to which he was not transferred. (Green Deposition at 31-45).

It is undisputed that the Department hired Bristle to fill an LEO I position in Raleigh on February 1, 1986. Bristle was a non-minority male who had not previously worked for the State. Bristle came to this post with a Bachelor of Arts degree and Master of Arts degree in criminal justice and twelve years of law enforcement experience. As a result, plaintiff filed complaints with the North

Carolina Office of Administrative Hearings and the EEOC. The Office of Administrative Hearings made a ruling in plaintiff's favor, but the EEOC declined to do so, finding that there was no just cause for the charge.

After reviewing the evidence presented by plaintiff, the Court finds that, while plaintiff may have been qualified for this LEO I position, a reasonable person could readily have decided that Bristle's educational and investigative qualifications were preferable to those of plaintiff. The Court finds that the Department's proffered justification for choosing Bristle over plaintiff on this basis is valid, reasonable and does not give rise to an interence of discriminatory intent. Consequently, since plaintiff cannot establish a prima facie case either

through direct evidence of discrimination or indirect evidence that would support a reasonable probability that plaintiff would have been transferred but for his race, his claim must fail.

The same holds true for plaintiff's claim as to his denial of a transfer in October 1986. The Court is not persuaded by plaintiff's sweeping contention, made with little evidentiary support, that the Department failed to choose plaintiff on the basis of his race. The evidence illustrates that after the interview process in which plaintiff was a participant, the Department ranked plaintiff third among the candidates vying for the position behind Reams and a non-minority female. The proffered basis for Reams superior ranking was his superior educational background which included an Associate's degree and

Bachelor's degree in Business Administration as well as his supervisory and investigative experience. The evidence, even when taken in the light most favorable to plaintiff, simply does not raise an inference of discrimination.

Finally, plaintiff argues that the Department denied him a transfer to Raleigh in 1988 in retaliation for his having filed an EEOC complaint in October of 1987. The Department asserts that there was never a vacant LEO I position available in Raleigh in 1988. This is so, according to the Department, because the alleged position was simply the result of an administrative change between two existing Raleigh LEO I's, and no new position was created at that time. Again, plaintiff's contention does not conform to the evidence presented. Instead, the evidence supports the Department's contention that the

position "created" in Raleigh in 1988 was not a new position at all, but simply an administrative change where the job assignments of two existing Raleigh Inspectors, Reams and Lawrence, were reversed for legitimate management reasons. Accordingly, the Court finds that plaintiff again has failed to meet his burden of establishing a prima facie case of discrimination.

On April 10, 1990, the Department notified plaintiff that he was to transfer to an LEO I position in Raleigh effective May 1, 1990. Plaintiff accepted this transfer and remains in this position today. Nevertheless, plaintiff filed this lawsuit on June 7, 1990 alleging the violations discussed above. The evidence plaintiff presents in support of his charges of racial discrimination by the Department is anecdotal at best and

inaccurate at worst. The Court finds that plaintiff has failed to produce a *prima facie* case of discrimination through any of his allegations. In fact, it is the conclusion of the Court that, construing all the evidence presented by plaintiff in the light most favorable to him, he has failed to raise more than a remote possibility that but for his race he would have been treated any differently by the Department. Accordingly, for the reasons stated above, defendant's Motion to Dismiss will be denied and defendant's Motion for Summary Judgment will be granted.

IT IS THEREFORE, ORDERED that defendant's Motion to Dismiss for lack of subject matter jurisdiction be, and the same hereby is, **DENIED.**

IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment be, and the same hereby is, GRANTED.

_____
United States District Judge
July 21, 1992.

STATE OF NORTH CAROLINA
IN THE COUNTY OF WAKE

North Carolina Division of Motor Vehicles, Petitioner	)	
vs.	)	ORDER
Isaiah Green, Jr., Respondent	)	

This matter came on for hearing before the undersigned Judge residing at the July 8, 1988 Civil Term of Wake County Superior Court upon a Petition of the North Carolina Division of Motor Vehicles for Judicial Review of a final Order of the State Personnel Commission, dated December 22, 1986, which adopted the Administrative Law Judge's Recommended Decision to transfer the Respondent to the first Law Enforcement vacancy in Wake County which occurs following the effective date of the Decision and Order and to pay Respondent's reasonable attorney's fees. At the time

this matter was called for hearing. Petitioner was represented by Jane P. Gray, Special Deputy Attorney General. Respondent was represented by counsel, Anita Davis Pearson of Raleigh, North Carolina.

Having reviewed the pleadings, transcript and the entire record, as well as briefs and arguments of counsel, this Court finds and concludes as follows regarding the Exceptions to the Order of the State Personnel Commission noted by the Petitioner:

1. Finding of Fact No. 6 is supported by competent evidence viewed in light of the record as a whole.

2. Findings of Fact Nos. 11, 12, 13 are supported by competent evidence viewed in light of the record as a whole.

3. Finding of Fact No. 17 is supported by competent evidence viewed in light of

the record as a whole.

4. Finding of Fact No. 19 is supported by competent evidence viewed in light of the record as a whole.

5. Finding of Fact No. 22 is supported by competent evidence viewed in light of the record as a whole.

6. Findings of Fact Nos. 23 and 24 are supported by competent evidence viewed in light of the record as a whole.

7. Finding of Fact No. 25 is supported by competent evidence viewed in light of the record as a whole.

8. Finding of Fact No. 26 is supported by competent evidence viewed in light of the record as a whole.

9. Conclusions of Law Nos. 2, 3 and 9 are supported by competent evidence and by findings of fact.

10. Conclusion of Law No. 5 is not supported by competent evidence or by

the findings of fact but this deficiency standing alone does not justify reversal or remand.

11. Petitioner's request for Additional Proposed Findings of Fact is denied.

For the foregoing reasons, the Court concludes as of law that the Order of the State Personnel Commission is supported by substantial evidence in view of the entire record.

WHEREFORE, IT IS NOW ORDERED, ADJUDGED AND DECREED that the Decision and Order of the State Personnel Commission of December 22, 1986, be and the same is affirmed in its entirety. This Petition is dismissed with prejudice and Petitioners shall pay the costs of this action.

This the 20th day of August, 1988.

B. Craig Ellis

Superior Court Judge

STATE PERSONNEL COMMISSION

ISAIAH GREEN, PETITIONER	)DECISION AND ORDER)FOR THE FULL) COMMISSION
- vs -	) BY
DIVISION OF MOTOR VEHICLES,	) RICHARD V. LEE,
RESPONDENT	) DIRECTOR OF STATE PERSONNEL

The full State Personnel Commission considered the Recommended Decision of the Office of Administrative Hearings Administrative Law Judge, Fred G. Morrison, Jr. at its meeting of December 18, 1986. Members of the Commission participating in the decision were: Mrs. Polly W. Brewer, Dr. Stephen Thomas, Mrs. Marlene Safrit and Miss Leonora Carawan.

A P P E A R A N C E S

For the Petitioner: Ms. Anita Davis, Currie, Pugh and Davis; Raleigh, North Carolina, appearing.

For the Respondent: Ms. Jane Grey, Special Deputy Attorney General, Attorney General's Staff, appearing.

After full consideration of this matter, the State Personnel Commission hereby adopts the findings and conclusions of the Recommended Decision as its own, except that the Commission specifically

declines to adopt the ALJ's Conclusion number 5. The Commission declines to adopt this Conclusion in that the record clearly sets forth that the issue of abuse of discretion was rot raised by either party and was not dealt with in the hearing. Thus, a conclusion on such an issue is beyond the authority of the ALJ or the Commission to decide.

Based upon its adoption of the Recommended Decision, the Commission hereby orders that:

(1) the Respondent transfer the Petitioner to the first LEO I vacancy in Wake County which occurs following the effective date of this Decision and Order;

(2) the Respondent pay Petitioner's reasonable attorney's fees in this matter; the amount of such fees to be determined by a submission from Petitioner's attorney setting forth an itemization of attorney's fees in this matter, such submission to be made jointly to this Commission and Respondent. An award of such fees shall be made at the next meeting following this Decision and Order.

Richard Y. Lee
Director of State Personnel

12/22/86

cc: Honorable William S. Hiatt
Mr. Isaiah Green, Ms. Anita Davis
Ms. Jane Grey, Ms. Jeanne Horton

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
COUNTY OF WAKE

96 OSP 22

ISAIAH GREEN JR., Petitioner,	)
	) RECOMMENDED
v.	) DECISION,
	) G.S. 150b-34
NORTH CAROLINA DIVISION OF MOTOR VEHICLES, Respondent.	)

The appeal of Isaiah Green Jr., an employee of the Division of Motor Vehicles, was heard by Fred Gilbert Morrison Jr., Administrative Law Judge, Office of Administrative Hearings, on August 28, 1996 in Raleigh, North Carolina.

The hearing was called to order at 10:00 a.m.

APPEARANCES

FOR THE PETITIONER: Currie, Pugh & Davis of Raleigh, North Carolina; Ms. Anita F. Davis, appearing.

FOR THE RESPONDENT: The Honorable Lacy H. Thornburg, Attorney General, Raleigh, North Carolina;
Ms. Jane P. Gray, Special Deputy Attorney General, appearing.

ISSUE

Did Respondent illegally discriminate against Petitioner on the basis of his race in denying his request for a lateral transfer to Wake County?

OPINION OF THE HEARING OFFICER

Based on competent evidence admitted at the hearing, the Hearing Officer makes the following:

FINDINGS OF FACT

1. Mr. Isaiah Green Jr. (Petitioner) is employed as a Law Enforcement Officer I (LEO I) with the Division of Motor Vehicles (Respondent). At the time of this appeal the Petitioner had thirteen (13) years of continuous State service.

2. The parties have stipulated that the Petitioner is a permanent state employee subject to the State Personnel Act and that the Office of Administrative Hearings has jurisdiction to hear his case.

3. Petitioner is a Black Male who meets the Respondent's qualifications/requirements for the position or LEO I which he has filled since January 1, 1985.

4. Petitioner's first assignment of duty as a LEO I was in Rocky Mount, North Carolina.

5 Petitioner has requested verbally and

in writing several times a lateral transfer to Wake County since his promotion to the LEO I position.

6. Since being promoted to the LEO I position the Petitioner's work performance has been rated by his superiors as "Overall Acceptable" with commendation for participation in the Theft Investigation Program noted on his Work Planning/Performance Review form for the period July 1, 1985 to June 30, 1986. (Petitioner's Exhibit #2).

7. On 8-1-85 the Petitioner received a performance salary increase from $23,700.00 to $24,792.00.

8. Petitioner's prior work with Respondent as Vehicle Inspection Officer was rated as "Overall Acceptable" or "Overall Satisfactory".

9. Prior to joining Respondent the Petitioner had 10 years of service as a Trooper with the State Highway Patrol which included 960 hours of training at the UNC-CH Institute of Government. Petitioner is a high school graduate and a Certified Law Enforcement Officer.

10. On 8-1-85 Manuel Cruz, a former policeman in Rocky Mount, was employed by Respondent in a LEO I position and was assigned to Orange county.

11. Manuel Cruz wanted to be assigned to Nash County; he knew of Petitioner's desire to be transferred to Wake County; he

discussed with Petitioner and their superiors an exchange of duty stations so each could be nearer or with their families.

12. Mr. F. E. Holmes, Petitioner's District Supervisor, suggested that Petitioner exchange duty stations to accommodate Cruz and told Petitioner that he would have no objection if Petitioner could arrange a future transfer to Wake County.

13. Based upon his understanding that an exchange of duty stations with Manuel Cruz would be a step toward an eventual transfer to Raleigh, Petitioner exchanged duty stations with Cruz and went to Orange County on 9-2-85.

14. On 11-27-85 the Respondent by job posting sought applicants for a LEO I position in Wake County.

15. Petitioner applied verbally and in writing for the LEO I position in Wake County and requested a lateral transfer from Orange to Wake County.

16. Donald Stahl, Respondent's Director of Enforcement, advised Petitioner that his request was being considered but that the subject position would likely be filled by a new hire.

17. Petitioner was not interviewed for the LEO I position in Wake County. Wake County has never had a Black Male serve in a LEO I position. Of 114 LEO I positions in North Carolina, only 5 or 6 are filled by Blacks.

18. Respondent employed Emanuel C. Bristle, a White Male, in the position. Bristle was living in Jefferson, North Carolina when he applied and wanted to be assigned to Union County, North Carolina.

19. Director Stahl testified that he recommended Bristle's employment based upon information received that Bristle was a college graduate with a master's degree in public administration who had served thirteen years as a policeman in New York with experience in stolen vehicle investigations. Stahl said he wanted Bristle in Wake County because it has a large number of stolen vehicles. Stahl sat in on the interview of Bristle, but did not participate in or conduct it.

20. Respondent filled nine other LEO I positions along with Bristle's, two being Females (including 1 Black Female in Wake County) and seven other White Males. The position filled by a Black Female was new and not the seat sought by Petitioner as its beginning salary was much below his current pay.

21. Petitioner's promotion from VIO to LEO I effective January 1, 1985 was shortly before Republican Governor James G. Martin succeeded former Democratic Governor James B. Hunt Jr. Respondent took no action to revoke this promotion as it did several others similarly made.

22. During his 13 years as a State employee the Petitioner has received commendations for his service from many citizens and public officials (such as Secretary of State Thad Eure and former Secretary of Transportation Thomas Bradshaw).

23. Respondent's officials suggested, encouraged and approved the lateral transfers and exchange of duty stations involving the Petitioner and Manuel Cruz in August of 1985 primarily so Cruz could reside with his family in Rocky Mount.

24. Respondent's officials have not approved Petitioner's repeated requests for a lateral transfer to Wake County so he can continue to reside with his family in Raleigh and not be required to move them to Hillsborough.

25. The Commissioner of Motor Vehicles confirmed Director Stahl's recommendation and made the ultimate decision to hire Emanuel Bristle and any Petitioner's request for lateral transfer.

26. The Commissioner of Motor Vehicles was not presented as a witness to give or explain his reasons for employing Bristle and denying Petitioner's request for a lateral transfer. No college records or transcripts for Bristle were introduced, nor did his interviewers testify as to procedures used in making their recommendation to the Commissioner.

27. Respondent's posted qualifications for the subject position were: Graduation from high school and five (5) years of law enforcement or investigative experience; or an equivalent combination of training and experience. Certified Law Enforcement Officer. Involves enforcement of state law and regulations relating to the operation and sale of motor vehicles, laws pertaining to registration, weight, licensing

of dealers and manufacturers, theft investigation, liability insurance inspections and the collection of licensing fees.

Based on the above Findings of Fact, the Hearing Officer makes the following:

CONCLUSIONS

1. Because Petitioner is a permanent State employee who has alleged race discrimination as the reason for the denial of his request for a lateral transfer from Orange County to Wake County, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue a recommendation to the State Personnel Commission which shall make the final decision in the matter. North Carolina General Statutes 126-36, 126-37 and 150B-23.

2. Where discrimination is an issue, Petitioner bears the ultimate burden of proof and must establish a prima facie case of discrimination by providing sufficient facts in order to raise an inference of discrimination. In order to establish a prima facie case of discrimination, Petitioner has shown the following:

   - that he is a member of a protected class (minority);
   - that Respondent was recruiting to fill the vacant LEO I position in Wake County;
   - that he applied for the vacant position which he was qualified for

and requested a lateral transfer to Wake County;

- that a white person was selected over him.

Thus, Petitioner has established a prima facie case of discrimination.

3. The Respondent has not clearly articulated legitimate nondiscriminatory reasons for its denial of Petitioner's request for a lateral transfer to Wake County. Donald Stahl testified that he recommended Emanuel C. Bristle because he was a college graduate with a master's degree in public administration who had served thirteen years as a policeman in New York with experience in stolen vehicle investigations while Petitioner had only a high school diploma with limited stolen vehicle investigations. Stahl only sat in on Bristle's interview and Petitioner was not even afforded an opportunity to be interviewed by those conducting same. No details were presented as to the interviews or criteria used before recommendations were made to the Commissioner. No college records or transcripts were presented, nor records detailing the work of Petitioner and Bristle in the area of stolen vehicle investigations, except that Petitioner had been commended by his superiors for participation in its theft investigation program and also received a performance salary increase on August 1, 1985.

4. Even if one were to conclude that Respondent has clearly articulated

legitimate nondiscriminatory reasons for its action, it is concluded that the Petitioner has shown that the stated reasons were, in fact, a pretext for discrimination. Director Stanl testified that of 114 LEI Is across North Carolina, only 5 or 6 are Black. He also stated that of 10 positions filled at the time of Bristle's, 8 were White Males, 1 White Female, 1 Black Female in an entry-level position for which Petitioner was not considered, and no Black Males. Also, no Black Male has ever filled a LEO I position in Wake County.

5. It is further concluded that Respondent abused it discretion in denying Petitioner's request for a lateral transfer to Wake County as its officials actively sought his assistance in accommodating his subsequently assumed a passive role when Petitioner had an opportunity to transfer to his home county. Respondent's actions in the Cruz transfer certainly led Petitioner to believe he would be similarly accommodated when a LEO I position became available in Wake County. Also, Respondent filled 10 LEO I positions across North Carolina at the time it denied Petitioner's request for a lateral transfer so there were multiple possibilities to honor the request of a veteran State employee with a satisfactory work record and hire 10 new officers (one of which could have filled Petitioner's position in Orange County upon his transfer to Wake County).

Based on the above Findings of Fact and Conclusions, the Hearing Officer makes the following:

RECOMMENDED DECISION

1. That Petitioner be granted a lateral transfer to Wake County;

2. That Petitioner be granted reasonable attorney's fees for legal expenses incurred in prosecuting his appeal before the Office of Administrative HeArings and the State Personnel Commission.

Fred Gilbert Morrison Jr.
Administrative Law Judge
Hearing Officer
October 24, 1986

FILED
OCT 28 1993
OFFICE OF THE CLERK

No. 93-420

In the
Supreme Court of the United States
October Term, 1993

Isaiah Green, Jr.,
Petitioner,

v.

North Carolina Department Of Transportation,
Division of Motor Vehicles,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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**Counsel of Record*

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QUESTIONS PRESENTED

1. Did the Fourth Circuit's upholding of summary judgment -- which disregarded race discrimination findings on the same issue by an administrative law judge, a state agency and a superior court -- undercut the policy of federal and state governments, not to mention this Court, to construct and enhance state administrative schemes to help eliminate employment discrimination?

2. Is the Fourth Circuit's slight of findings of race discrimination by a North Carolina administrative law judge after a due process hearing and by a state Superior Court judge who reviewed the hearing's transcript and evidence, inconsistent with 28 U.S.C. § 1738, other Circuits, and decisions of this Court?

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No. 93-420

In the
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Isaiah Green, Jr.,
Petitioner,

v.

North Carolina Department Of Transportation,
Division of Motor Vehicles,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent North Carolina Department of Transportation, Division of Motor Vehicles, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's unpublished *per curiam* opinion in this case.

STATEMENT OF THE CASE

A. The Proceedings Below

On or about February 26, 1986, petitioner filed a grievance in the North Carolina Office of Administrative Hearings (hereinafter OAH) alleging racial discrimination. (App 1a-5a) On April 29, 1986, petitioner filed a discrimination charge, alleging the same facts, with the Equal Employment Opportunity Commission (EEOC). (App 7a-10a) The EEOC issued a determination that no reasonable cause was found to believe the allegations made were true on August 22, 1986. (App 11a-12a) On October 24, 1986, a North Carolina Administrative Law Judge made a nonbinding recommended decision finding discrimination. (Pet App 37a-46a) This became binding upon the respondents following review by the North Carolina Superior Court. (Pet App 31a-36a)

On March 2, 1987, petitioner filed a second EEOC complaint charging racial discrimination. (App 13a-18a) This complaint alleged some of the same facts pled in the 1986 grievance filed with the OAH and in the 1986 EEOC complaint and alleged retaliation for filing the April 29, 1986 EEOC complaint. Petitioner also filed the same charge with the OAH at approximately the same time. On March 28, 1989, the OAH determined that no cause existed for this charge. (App 19a-20a)

On October 5, 1987, petitioner filed a third EEOC complaint alleging racial discrimination based upon his allegedly discriminatory rate of pay. (App 21a-23a) On

March 21, 1989, the OAH, as the deferral agency, found no reasonable cause existed for this charge. (App 25a-26a) The EEOC, on June 26, 1989, reached the same conclusion. (App 27a-28a)

On October 27, 1988, petitioner filed his fourth EEOC complaint charging racial discrimination in refusing to transfer him, as well as retaliation for three prior EEOC complaints. (App 29a-31a) The OAH, again, determined that no reasonable cause existed for the charge. (App 33a-34a)

On March 9, 1990, the EEOC determined there to be no cause for the March 2, 1987 and October 27, 1988 charges, and thereupon issued right to sue letters. (App 35a-36a, 37a-38a) On June 7, 1990, petitioner filed a civil action pursuant to 42 U.S.C. § 2000(e) *et. seq.* (Title VII) based upon these right to sue letters. (App 39a-47a) On July 21, 1992, the United States District Court for the Middle District of North Carolina granted the respondent's motion for summary judgment. (Pet App 5a-30a)

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. On May 18, 1993 the Fourth Circuit issued an unpublished *per curiam* opinion finding petitioner's appeal without merit and affirming the district court's grant of summary judgment. (Pet App 3a-4a) Petitioner then filed a petition for rehearing and suggestion for rehearing *in banc*. (App 49a-66a) The circuit court denied that petition on June 14, 1993. (Pet App 1a-2a)

B. Statement of the Facts

Petitioner is an African-American who voluntarily transferred from the North Carolina Highway Patrol to the Enforcement Section of the North Carolina Department of Transportation, Division of Motor Vehicles (hereinafter Division). He was aware, at the time of his transfer, that the Division would assign him as a Vehicle Inspection Officer I (VIO I) which was compensated at a lower rate than he had earned in the Highway Patrol. He nonetheless consented to this pay decrease. The Division placed him at pay grade sixty-one, the very top pay scale for the VIO position. Petitioner was assigned to Hillsborough, North Carolina, whereupon he immediately requested a transfer to Raleigh, North Carolina.

Three and one-half years later, on January 1, 1985, the Division promoted petitioner to Law Enforcement Officer I (LEO I) and transferred him to Rocky Mount, North Carolina. His pay scale was increased to pay grade sixty-nine, increasing his salary by forty-five percent. He again requested a transfer to Raleigh.

On February 1, 1986, the Division hired Emanuel Bristle to fill a LEO I position in Raleigh. Bristle is a white male with a Bachelor's degree and a Master of Arts degree in criminal justice. At the time he had twelve years of experience in law enforcement.

On March 4, 1986, pursuant to N.C. GEN. STAT. § 150B-23 (1983), petitioner filed a petition with the North Carolina Office of Administrative Hearings (OAH) alleging

that the Division had discriminated against him because of his race by hiring Bristle instead of transferring petitioner to Raleigh. A decision was rendered for the petitioner. This decision was subsequently affirmed, in part, by the North Carolina Office of State Personnel and the Superior Court for Wake County, North Carolina.

On April 29, 1986, the petitioner filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging racial discrimination because of the Bristle hiring. Unlike the OAH, the EEOC determined that there was no just cause for the charge.

On October 8, 1986, the Division hired Ronald Reams (Reams) for a LEO position in Raleigh. Petitioner again filed a petition with the OAH and with the EEOC complaining of racially motivated discrimination against him. These petitions were both dismissed.

In March of 1988, the Division offered to transfer petitioner to a LEO I position in Raleigh. Petitioner refused this transfer stating that the position was that of an undercover officer, and was of low status.

In October of 1988, two LEO's already stationed in Raleigh swapped job assignments. Petitioner erroneously perceived this as the creation of two new positions and a failure by the Division to transfer him to either position. He filed another complaint with the EEOC alleging racial discrimination. Again, the EEOC found no just cause for the charge.

On January 30, 1990, petitioner filed yet another EEOC complaint alleging racial discrimination regarding the pay of a newly hired LEO I and the reclassification of another LEO. The EEOC determined there to be no just cause for this charge, whereupon petitioner filed a Title VII action in the Federal District Court for the Eastern District of North Carolina. Petitioner subsequently voluntarily dismissed that case.

On May 1, 1990, the Division transferred petitioner to a LEO I position in Raleigh.[1]

Petitioner based this action, filed June 7, 1990, upon his March 9, 1990 right to sue letters from the EEOC. In the complaint here, petitioner recites his failure to receive a merit raise (Complaint ¶ 6) as well as an October 8, 1986 denial of a transfer (Complaint ¶ 9) and alleged retaliation for having filed earlier EEOC charges as evidencing the discrimination. (App 43a-44a) The right to sue letters from the EEOC terminated charges other than the charge filed April 29, 1986 concerning the Bristle hiring. The facts underlying that EEOC charge also formed the basis of the parallel OAH proceeding in which petitioner obtained a favorable ruling in Superior Court.

In his complaint, petitioner also asserted claims under 42 U.S.C. § 1981 (1988) and North Carolina state common law, but later abandoned these claims. The district court

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[1] Petitioner was promoted to the position of Assistant District Supervisor (LEO II) pay grade 71, effective November 1, 1992.

granted summary judgment for the respondents on the Title VII action and the Fourth Circuit affirmed in an unpublished *per curiam* opinion.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS WHICH PETITIONER PRESENTS THIS COURT FOR REVIEW DO NOT ARISE IN THIS CASE. PETITIONER'S CIVIL ACTION FILED IN FEDERAL DISTRICT COURT DID NOT RAISE THE ISSUES REACHED AND DECIDED BY THE EARLIER REVIEWED NORTH CAROLINA ADMINISTRATIVE PROCEEDING.

Petitioner requests that this Court issue its Writ of Certiorari to consider the district court's alleged disregard of reviewed race discrimination findings by a state administrative agency. Petitioner asserts that such disregard contravenes an expressed policy to construct and enhance state administrative schemes aimed at the elimination of employment discrimination and violates the full faith and credit requirement set forth in 28 U.S.C. § 1738. The record of the proceedings below indicates that neither of these questions arise in this litigation. The complaint here alleges instances of discrimination not raised or decided in the reviewed state administrative proceeding. Additionally, petitioner, in the courts below, failed to assert the preclusive effect of such proceedings except as a footnote in his motion for reconsideration filed with the court of appeals. Finally, petitioner failed to comply with the requirements of 28

U.S.C. § 1738 in that he never provided the district court with properly authenticated copies of the purportedly preclusive state court proceeding. Petitioner raises no issues ripe for certiorari review by this Court.

A. The Reviewed Findings Which Petitioner Contends the Courts Below Should Have Given Preclusive Effect Stem from an Instance of Alleged Discrimination Other Than Those Alleged in This Action.

Petitioner contends that the district court should have given preclusive effect to the findings of the OAH determined in a case filed with that agency on March 1, 1986. This 1986 case stemmed from the respondent's failure to transfer petitioner to an LEO position in Raleigh, N.C. and the hiring of Emanuel Bristle to fill that position. Petitioner's Title VII action, however, arose from two subsequent EEOC and OAH complaints. These complaints, one filed in 1987 and the other in 1988, alleged, as discrimination, respondent's failure to transfer petitioner and the hiring of Ronald Reams to an LEO position in Raleigh. Petitioner's complaint filed in the district court specifically refers to the right-to-sue letters issued in those actions and not the right-to-sue letter from the 1986 EEOC complaint. The OAH found no reasonable cause in both of those subsequent complaints, and the EEOC concurred. In short, no reviewed state court proceedings addressed the discriminatory conduct complained of by petitioner in this action.

University of Tennessee v. Elliott, 478 U.S. 788 (1986), and *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) plainly require an identity of claims in the reviewed state proceeding and the federal Title VII action. Here, the record indicates that this civil action rests upon different claims of discrimination and supporting facts than the reviewed state administrative findings. Petitioner demonstrates no expressed or implied policy contravened by the district court's summary judgment rendered against him upon a claim and facts distinct from those considered by the OAH. This Court should decline to issue its Writ.

B. Petitioner Failed to Properly Raise, in the District Court and on Appeal, the Issue of the Preclusive Effect of the Reviewed State Administrative Proceedings.

Petitioner failed, before the district court and in the court of appeals, to assert the preclusive effect of the reviewed state court proceedings. As a result, neither the district court nor the circuit court considered or decided the issue. This Court should not issue its Writ to decide such questions neither raised in nor passed upon by the courts below. *See Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). The propriety of such holding appears especially true with regard to preclusion issues. In the context of *res judicata* and collateral estoppel as affirmative defenses, the courts have repeatedly held that if these defenses are not pled at trial, they will not be heard on appeal. *See Sartin v. Commissioner of Public Safety of the State of Minnesota*, 535

F.2d 430 (8th Cir. 1976), *Alsager v. District Court of Polk County, Iowa*, 518 F.2d 1160 (8th Cir. 1975). The preclusive effect of a state proceeding appears similar.

In his Petition for Rehearing and Suggestion for Rehearing *in banc*, petitioner acknowledges that the preclusion claim was not "raised by either side below." Petition for Rehearing and Suggestion for Rehearing *in banc* at 5 n.1. (App 54a) Yet, he now couches the majority of his argument in support of this Court's Writ of Certiorari in terms of this issue. Petitioner allowed the district court no opportunity to consider the preclusive effect of the earlier determination on this Title VII action in light of the facts and circumstances giving rise to this claim. In light of petitioner's failure to raise and obtain a ruling upon this issue in the lower courts, this Court should deny Certiorari.

C. Petitioner Failed to Comply with the Requirements of 28 U.S.C. § 1738 When He Failed to Provide the District Court with Properly Certified and Authenticated Copies of the Reviewed State Court Proceedings.

Petitioner contends that the district court should have given the reviewed state court proceedings preclusive effect in this Title VII action. The full faith and credit portion of 28 U.S.C. § 1738 clearly applies under such circumstances, including the authentication provisions thereof. Section 1738 states in relevant part:

> The records and judicial proceedings of any court of any such State, Territory or Posses-

> sion, or copies thereof, *shall be proved or admitted* in other courts within the United States and its Territories and Possessions *by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.*
>
> Such Acts, records and judicial proceedings or copies thereof, *so authenticated*, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State. . . .

28 U.S.C. § 1738 (1989) (emphasis added).

This statute, in explicit detail, sets forth the manner by which state judicial proceedings must be authenticated in order to receive full faith and credit by other courts. In fact, almost two-thirds of its text is addressed to the proper method of authentication. Section 1738 then provides that acts and judicial proceedings authenticated in accordance with its prescribed methods will be given full faith and credit. While the language does not, in specific words, proscribe the granting of full faith and credit to unauthenticated judicial proceedings, the construction of the statute indicates that such result was exactly intended by the drafters. Indeed, because the statute so thoroughly discusses methods of authentication, the reasonable conclusion, by implication, is that the statute requires full faith and credit be given *only* to

judicial proceedings authenticated pursuant to its prescribed terms.

The record before the lower courts reveals that the petitioner, in his brief opposing the motion for summary judgment, submitted only photostatic copies of the North Carolina Administrative Law Judge's findings, and of the opinions of the North Carolina Office of State Personnel and Wake County Superior Court. These copies were not certified or authenticated in any other way. (Pet App 31a-36a) As such, the records clearly do not conform with the strict authentication provisions of § 1738. The district court was, therefore, not obligated by § 1738 to grant these state judicial proceedings full faith and credit.

In *Horwitz v. State Board of Medical Examiners of the State of Colorado*, 822 F.2d 1508 (10th Cir. 1987), *cert. denied*, 484 U.S. 964 (1987), the Court of Appeals for the Tenth Circuit faced a situation very similar to the one now before this Court. There, the party opposing a motion for summary judgment (appellees) raised, for the first time on appeal, a defense of *res judicata*, citing an opinion rendered by the Colorado State Court of Appeals concerning the transactions subsequently brought before the Federal District Court. The Tenth Circuit noted that the appellees had failed to timely inform the district court of the state court decision, and had otherwise failed to demonstrate why the court should consider the *res judicata* argument for the first time on appeal. Of equal importance to the disposition of the case at bar, the *Horwitz* Court stated that an authenticated copy of the state court opinion was absent from the record on appeal

"as required under 28 U.S.C § 1738 in order to have full faith and credit effect." 822 F.2d at 1512.

Petitioner failed to comply with the authentication requirements of 28 U.S.C. § 1738. Thus, both the district court and the circuit court properly failed to consider the preclusive effect of the proceeding, even had petitioner properly raised the issue. Under such circumstances, this Court's Writ of Certiorari ought not issue.

CONCLUSION

Petitioner presented no issue ripe for consideration by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL F. EASLEY
North Carolina Attorney General

Harold F. Askins*
Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0619
(919) 733-3254

October 28, 1993

*Counsel of Record

APPENDIX

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February 17, 1986

Isaiah Green Jr.
3222 Holiday Dr.
Raleigh, N.C. 27610

To: State Personnel Commission

RE: Racial Discrimination in Employment Practices

Dear Chairperson,

I am a employee with the Department of Motor Vehicles, serving in the capacity of a Law Enforcement Officer, and have served the citizens of North Carolina in such a capacity for some 17 years. I am presently serving as a LEO-I (Inspector), and is stationed at Hillsborough N.C. I was previously stationed at Rocky Mount, N.C., but was requested by my then immediate supervisor, Mr. P.E. Holmes, district III supervisor, to laterally transfer to Hillsborough N.C. to assist LEO-I (Inspector) Manuel Cruz, who was recently hired by DMV and stationed at Hillsborough N.C. This transfer was to facilitate Inspector Cruz so he could come back home, and it was to assist the Department of Motor Vehicles inasmuch that Inspector Cruz was familiar with the Rocky Mount area and the people that lived there. This transfer was worked out between acting Director of DMV Enforcement Section, Mr. B.N. Hopper, D.S. P.E. Holmes (Raleigh), D.S. J.S. Hill (Greensboro), Inspector Cruz and myself with the understanding that when Position No. 72810 became available in Wake Co. that I

could laterally transfer to Wake Co. where my family is now living. I was to be given priority over anyone else who had lesser time in grade than I had. I agreed to transfer under these conditions. When the job posting came out for the Wake Co. position, I contacted Mr. Donald W. Stahl, the new director of DMV Enforcement concerning submitting a letter for a lateral transfer, and he advised that I could go ahead an [sic] submit the letter, but the Federal Government was putting pressure on them to hire a female. He told me, more than likely a female would be hired. On February the 3rd, 1986, a Mr. Manuel Bristol, a white male was hired for the position in Wake Co. The DMV (Enforcement Section) has only 5 Black Inspectors in the state as it relates to minority representation, taking in consideration a total compliment of 110 LEO-I's. Raleigh, the capitol of this great state has no minority representation. The Black Community and Legal Counsel would suggest that D.O.T. redress such an issue, it being that Manuel Bristol is a white male and no prior service given in the job capacity which he now holds. The Black Community and Legal Counsel consider this to be a Racial Injustice and trust that some remedial action be taken to rectify such an issue, it being that the Black Community deserve [sic] the representation.

Thank you,

s\Isaiah Green Jr.
Isaiah Green, Jr.

HEARING REQUEST INFORMATION FORM

INSTRUCTIONS: Please fill in all information that applies to your grievance. If you have any questions, call the Employee Relations Division at (919) 733-7112. Sign this form on the back and have it notarized. Return this form as soon as possible to: Chief Hearing Officer, Office of State Personnel, 116 West Jones Street, Raleigh, North Carolina 27611.

NAME Isaiah Green, Jr.

ADDRESS 3222 Holiday Dr.

Raleigh, N.C.

ZIP 27610 PHONE [Home](919) 772-1798
[Business](919) 732-7826

EMPLOYER AGENCY D.M.V. - Enforcement Section

PAYGRADE 69

MONTHS OF CONTINUOUS 56 with D.M.V. Enf. Sec.

GRIEVANCE ISSUE(S): Dismissal ___ Demotion ___
Suspension ___ Promotion ___
Other Lateral Transfer

Discrimination:

Race X Sex _____ Age _____
National Origin _____ Religion _____
Handicapping Condition _____
Political Affiliation _____ Other _____

MY GRIEVANCE CONCERNS

RACIAL DISCRIMINATION IN EMPLOYMENT PRACTICES

WHEREAS A BLACK CAREER EMPLOYEE REQUESTED A

LATERAL TRANSFER TO WAKE CO. (POSITION NO.

72810) AND WAS DENIED, PRIORITY BEING GIVEN TO

A NEWLY HIRED WHITE MALE EMPLOYEE IN THIS POSITION.

THE EMPLOYEE HIRED IS MR. E.C. BRISTLE.

[Use additional pages, if necessary, to explain your grievance.]

ATTORNEY - YES X / NO _____
If Yes, NAME Anita R. Davis

ADDRESS Suite 220 - 205 Fayetteville Street Mall
P.O. Box 1708 Raleigh N.C. 27602

PHONE 828-8787

IF I AM SUCCESSFUL IN MY GRIEVANCE, I WOULD LIKE TO HAVE THE FOLLOWING REMEDIES:

TRANSFERRED LATERALY TO POSITION NUMBER 72810 IN

WAKE COUNTY. ATTORNEY FEES PAID TO THE COMMISSION

LEVEL OF REPRESENTATION. PAYMENT MADE FOR TIME

INVOLVED IN TRAVEL FROM RALEIGH N.C. TO DURHAM AND

HILLSBOROUGH, N.C., TO DUTY STATION, AND RETURNING

TO RALEIGH, PAYMENT FOR GASOLINE AND CAR EXPENSE, ALL BEGINNING 2-3-86 UNTIL THE RESOLUTION OF THIS GRIEVANCE.

Isaiah Green, Jr. being first duly sworn, deposes and says that he/she is the Grievant in this matter; that he/she has read the above information and that the information set forth above is true and factual to the best of his/her knowledge, information and belief.

s\Isaiah Green Jr.
GRIEVANT

Sworn and subscribed to before me,
this 26th day of February, 1986.

s\Sherry L. Dixon SEAL
NOTARY PUBLIC

My commission expires: 5-14-90

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CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974, see Privacy Act Statement on reverse before completing this form.

ENTER CHARGE NUMBER
___ FEPA _X_ EEOC 018860691

Received EEOC
Raleigh Area Office
Raleigh, N.C.
Apr 29 11:38 AM '86
and EEOC

_____
(State or Local Agency, if any)

NAME *(Indicate Mr., Ms., or Mrs.)*
Mr. Isaiah Green, Jr.

HOME TELEPHONE NO.*(Include Area Code)*

STREET ADDRESS: 3222 Holiday Drive
CITY, STATE, AND ZIP CODE: Raleigh, NC 27610
COUNTY: Wake

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more then one list below.)*

NAME
NC Dept. of Transportation
(Division of Motor Vehicles)

NO. OF EMPLOYEES/MEMBERS: 407

TELEPHONE NO. *(Include Area Code)*
919-733-7872

STREET ADDRESS: 1100 New Bern Avenue
CITY, STATE, AND ZIP CODE: Raleigh, N.C. 27967

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

_XX_RACE(B) ___COLOR ___SEX ___RELIGION
___NATIONAL ORIGIN ___AGE ___RETALIATION
___OTHER *(Specify)*

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, year)*

January 8, 1986

THE PARTICULARS ARE *(If additional space is needed, attached [sic] extra sheet(s)):*

I. On January 8, 1986, I was denied a transfer from Hillsborough, NC to Wake County, NC as a Law Enforcement Officer I. I have been employed by the State of North Carolina since August, 1968. The Division of Motor Vehicles employs about 407 employees.

II. Donald W. Stahl, White, Director, told me during December 1985 that the Federal Government was putting pressure on him to hire a female for Wake County.

III. I believe that I am being discriminated against because of my race (Black) for the following reasons:

A. P. E. Holmes, White, District III Supervisor, requested that I transfer from Rocky Mount to Hillsborough, NC to help Manuel Cruz, Hispanic. I was told that I would be transferred to Wake County when an opening became available by P. E. Holmes.

B. Manuel Cruz was allowed to transfer from Hillsborough to Rocky Mount during September 1985. Rocky Mount is Manuel Cruz's home. He did not want to move his family to Hillsborough.

C. My transfer from Rocky Mount to Hillsborough and Wake County was worked out between P. E. Holmes, District III Supervisor, Acting Director B.N. Hopper, White, and J.S. Hill, White, District IV, and myself.

D. I was denied a transfer from Hillsborough to Wake County on January 8, 1986 by Donald W. Stahl, White, Director. Wake County is where my family resides.

E. Between December 1, 1984 and April 1, 1986, nine (9) White Law Enforcement Officers have been allowed to transfer. They are C. E. Nance, K. N. Riley, S. A. Hall, B. R. Davis, J. S. Saintsing, P. M. Kuebler, G. W. Tutterow, J. A. Sipes, and J. W. Turney.

___ I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

4-29-86 s/Isaiah Green, Jr.
Date Charging Party (Signature)

Notary - (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

RALEIGH AREA OFFICE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
127 W. HARGETT ST., SUITE 500
RALEIGH, N.C. 27601

Charge Number: 018860691

Isaiah Green, Jr.
3222 Holiday Drive
Raleigh, N.C. 27610

Charging Party

and

North Carolina Department of Transportation
Division of Motor Vehicles
1100 New Bern Avenue
Raleigh, N.C. 27967

Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission, the following determination as to the merits of only the Title VII allegations of the subject charge filed under Title VII of the Civil Rights Act.

All Title VII jurisdictional requirements have been met. Charging Party alleges that he was denied a transfer because of his race (Black). Examination of the evidence indicates that there is no reasonable cause to believe that this allegation is true. No determination is made as to any other issues which might be construed as having been raised by this charge.

This determination concludes the Commission's processing of the Title VII aspect of the charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days of receipt of this letter, and by taking the other procedural steps out in the enclosed Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On Behalf of the Commission:

8/22/86
Date

s/Richard E. Walz
Richard E. Walz, Area Director
Raleigh Area Office

Enclosures: Notice of Right to Sue
Copy of the Charge

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974, see Privacy Act Statement on reverse before completing this form.

ENTER CHARGE NUMBER

___ FEPA _X_ EEOC 141870562

OAH and EEOC

(State or Local Agency, if any)

NAME (*Indicate Mr., Ms., or Mrs.*)
Mr. Isaiah Green, Jr.

HOME TELEPHONE NO.(*Include Area Code*)
919-772-1798

STREET ADDRESS	CITY, STATE, AND ZIP CODE	COUNTY
3222 Holiday Drive	Raleigh, NC 27610	Wake

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more then one list below.*)

NAME	NO. OF EMPLOYEES/MEMBERS
NC Dept. of Transportation, Div. of Motor Vehicles- Enforcement Section	407

TELEPHONE NO. (*Include Area Code*)
919-732-7826

STREET ADDRESS	CITY, STATE, AND ZIP CODE
Route 6, PO Box 412	Hillsborough, N.C. 27278

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

_X_ RACE(B) ___ COLOR ___ SEX ___ RELIGION
___ NATIONAL ORIGIN ___ AGE _X_ RETALIATION
___ OTHER *(Specify)*

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, year)*

December 1, 1986

THE PARTICULARS ARE *(If additional space is needed, attached [sic] extra sheet(s)):*

I. On or around September 30, 1986, I was denied a merit increase. I was initially hired in June 1981 and have been employed as a Law Enforcement Officer in Field Inspection since January 1985. The Division of Motor Vehicles - Enforcement Section employs approximately 407 employees, of whom 40 are Black.

II. I have not asked the Division of Motor Vehicles why I was not given a merit increase nor was I given a reason.

According to the Department of Transportation's employee handbook, only 2/3 of the employees in a given department can receive a merit increase.

III. I believe I have been discriminated against on the bases of my race (Black) and in retaliation for filing EEOC #018860691 inasmuch as:

a. On April 29, 1986, I filed EEOC #018860691 in which I alleged I was denied a lateral transfer due to my race (Black).

b. I am the only Law Enforcement Officer I in the Hillsborough, NC Office. I received an "acceptable" rating on my performance appraisal.

c. There are 3 Caucasian Law Enforcement Officer Is in Respondent's Greensboro, NC facility. These 3 Law Enforcement Officer Is received an "acceptable" rating on their performance evaluations. However, these Caucasians Law Enforcement Officer Is received 50% of a step increase while I did not receive a merit increase. Another Black Law Enforcement Officer I, i.e., Alfonza Everett, who works in Respondent's Greensboro, NC Office, received 25% of a step increase even though he received an "acceptable" rating on his performance appraisal.

IV. I believe that the NC Department of Motor Vehicles discriminates against Blacks as a class in regards to pay increases.

I. Since December 1, 1986, and continuing, I have been paid unequal wages in comparison to my Caucasian counterpart.

II. I have not asked the Division of Motor Vehicles why I was being paid unequal wages nor have I been given a reason.

The NC Department of Transportation employee handbook does not address the issue of salaries.

III. I believe that I have been discriminated against on the bases of my race (Black) and in retaliation for filing #018860691 inasmuch as:

a. I am currently paid $25,692.00 annually and have been employed with the Division of Motor Vehicles for 6 years. I had 12 years of law enforcement experience before joining the Division of Motor Vehicles.

b. Mark Last Name Unknown (Caucasian), was hired in August 1985 and had 8 years of previous law enforcement experience. However, Mark Last Name Unknown is paid at least $31,000 annually.

IV. I believe that the NC Department of Transportation pays its Black employees lower salaries than its Caucasian employees even though these Caucasian employees do not have any special education or experience which would explain the difference in these salaries.

I. On October 8, 1986, I was denied a lateral transfer from Respondent's Hillsborough, NC Office to Respondent's Raleigh, NC Office.

II. I have not asked Respondnet why I was denied this lateral transfer nor was I given a reason.

According to Respondent's transfer policy, an employee is automatically qualified provided that the transfer is between classes having comparable qualification requirements.

III. I believe I have been discriminated against on the bases of my race (Black) and in retaliation for filing EEOC #018860691 inasmuch as:

a. Instead of transferring me, Respondent hired Robert Reams (Caucasian), from "off-the-street" for the position of Law Enforcement Officer I in Raleigh, NC. While I am not aware of Mr. Reams qualifications for the position in question, I believe that I was the better qualified candidate in that I have 18 years of law enforcement experience.

b. To the best of my knowledge, there has never been a Black employed as a Law Enforcement Officer I - Enforcement Section in Respondent's Raleigh, NC Office.

c. There have been at least 9 Caucasians who have been lateral transferred during the period 1984 thru 1986.

___ I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

3-2-87 s/Isaiah Green, Jr.
Date Charging Party (Signature)

Notary - (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

RECEIVED EEOC
RALEIGH AREA OFFICE
RALEIGH N.C.
MAR 2 2 04 PM '87

STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS
CIVIL RIGHTS DIVISION

March 28, 1989
OAH CHARGE #87-EEO-0184

CHARGING PARTY:
Mr. Isaiah Green, Jr.
3222 Holiday Drive
Raleigh, N. C. 27610

vs.

RESPONDENT:
NC Department of Transportation
Highway Building
1 South Wilmington Street
Raleigh, N.C. 27611

Re: Letter of Determination

Dear Mr. Green:

Under the authority vested in me by this agency's procedural regulations, I issue, on behalf of the Office of Administrative Hearings, the following Determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act.

The Respondent is an employer within the meaning of Title VII and all timeliness, jurisdictional and deferral requirements have been met. Charging Party alleges that he was discriminated against in violation of Title VII of the Civil Rights Act, as amended, by being denied a merit increase because of his race (Black) and by being paid unequal wages and denied a lateral transfer because of his race (Black) and in retaliation for having filed a previous charge. Examination of the evidence indicates that there is

no reasonable cause to believe that this allegation is true. No determination is made as to any other issues which might be construed as having been raised by this charge.

This Determination concludes this agency's processing of your employment discrimination charge. You are advised that you may appeal our Determination in your charge to EEOC within fifteen (15) days of the receipt of this letter. Our investigative files will be forwarded to the EEOC office which deferred your charge.

If you should have any questions concerning our Determination of the merits of your charge, please contact Ms. Paula Richardson at 733-0431.

On Behalf of the
Office of Administrative Hearings

s/Edward T. Smith
Edward T. Smith, Director
Civil Rights Division

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974, see Privacy Act Statement on reverse before completing this form.

ENTER CHARGE NUMBER
___ FEPA __ EEOC 141880012

N.C. Office of Administrative Hearings and EEOC
(State or Local Agency, if any)

NAME *(Indicate Mr., Ms., or Mrs.)*
Mr. Isaiah Green, Jr.

HOME TELEPHONE NO.*(Include Area Code)*
919-772-1798

STREET ADDRESS	CITY, STATE, AND ZIP CODE	COUNTY
3222 Holiday Drive	Raleigh, NC 27610	Wake

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more then one list below.)*

NAME	NO. OF EMPLOYEES/MEMBERS
N.C. Dept. of Transportation Div. of Motor Vehicles-Enforcement Section	400

TELEPHONE NO. *(Include Area Code)*
919-733-7872

STREET ADDRESS	CITY, STATE, AND ZIP CODE
1100 New Bern Avenue	Raleigh, N.C. 27697

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

_X_ RACE(B) ___ COLOR ___ SEX ___ RELIGION
___ NATIONAL ORIGIN ___ AGE ___ RETALIATION
___ OTHER *(Specify)*

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, year)*

August 31, 1987

THE PARTICULARS ARE *(If additional space is needed, attached [sic] extra sheet(s)):*

I. At a District meeting in Greensboro, NC on August 31, 1987, I learned that I was being paid a lesser salary than my Caucasian counterpart who works in Salisbury, NC. I have been employed with the Department of Motor Vehicles since 1981. Prior to that, I was with the Highway Patrol for ten (10) years. I am currently a Law Enforcement Officer I in Hillsborough, NC. I have been in this position for three (3) years. The Department of Motor Vehicles employs approximately 400 employees.

II. I did not ask nor was I given a reason for my being paid a lesser salary than my Caucasian counterpart.

III. I believe that I have been discriminated against because of my race (Black).

___ I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

10/5/87
Date

s/Isaiah Green, Jr.
Charging Party (Signature)

Notary - (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

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STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS
CIVIL RIGHTS DIVISION

March 21, 1989
OAH CHARGE #87-EEO-1012

CHARGING PARTY:
Mr. Isaiah Green, Jr.
3222 Holiday Drive
Raleigh, N. C. 27610

vs.

RESPONDENT:
NC Department of Transportation
Division of Motor Vehicles
Highway Building
1 South Wilmington Street
Raleigh, N.C. 27611

Re: Letter of Determination

Dear Mr. Green:

Under the authority vested in me by this agency's procedural regulations, I issue, on behalf of the Office of Administrative Hearings, the following Determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act.

The Respondent is an employer within the meaning of Title VII and all timeliness, jurisdictional and deferral requirements have been met. Charging Party alleges that he was discriminated against in violation of Title VII of the Civil Rights Act, as amended, by being paid a lesser salary than another employee because of his race (Black). Examination of the evidence indicates that there is no

reasonable cause to believe that this allegation is true. No determination is made as to any other issues which might be construed as having been raised by this charge.

This Determination concludes this agency's processing of your employment discrimination charge. You are advised that you may appeal our Determination in your charge to EEOC within fifteen (15) days of the receipt of this letter. Our investigative files will be forwarded to the EEOC office which deferred your charge.

If you should have any questions concerning our Determination of the merits of your charge, please contact Ms. Paula Richardson at 733-0431.

On Behalf of the
Office of Administrative Hearings

s/Edward T. Smith
Edward T. Smith, Director
Civil Rights Division

RALEIGH AREA OFFICE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
127 W. Hargett St., Suite 500
Raleigh, N.C. 27601
Charge Number: OAH #87-EEO-1012
EEOC 141880012

Mr. Isaiah Green, Jr.
3222 Holiday Drive
Raleigh, N.C. 27610

Charging Party

and

NC Dept. of Transportation
Division of Motor Vehicles
Highway Bldg. - 1 S. Wilmington St.
Raleigh, North Carolina 27611

Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning to Title VII and the timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded the findings of the North Carolina Office of Administrative Hearings.

Having examied [sic] the North Carolina Office of Administrative Hearing's findings and the record presented,

I conclude that there is not reasonable cause to believe the charge is true.

This concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private lawsuit in Federal District Court within 90 days of receipt of this Decision (please refer to the enclosed Information Sheet of Filing Suit in Federal Court).

Unless the Commission receives notification that the Charging Party has filed suit in Federal District Court, the case file will be destroyed one (1) year after the date of this letter in accordance with the Commission's records disposition procedures.

On Behalf of the Commission;

6/26/89 — s/Richard E. Walz

Date — Richard E. Walz, Director

Enclosures:
Copy of Charge
Information Sheet on Filing
Suite [sic] in Federal Court

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974, see Privacy Act Statement on reverse before completing this form.

ENTER CHARGE NUMBER

___ FEPA X EEOC 141890057

OAH and EEOC

(State or Local Agency, if any)

NAME (*Indicate Mr., Ms., or Mrs.*)
Mr. Isaiah Green, Jr.

HOME TELEPHONE NO.(*Include Area Code*)
919-772-1798

STREET ADDRESS	CITY, STATE, AND ZIP CODE	COUNTY
3222 Holiday Drive	Raleigh, NC 27610	Wake

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more then one list below.*)

NAME	NO. OF EMPLOYEES/MEMBERS
NC Dept. of Transportation Div. of Motor Vehicles-Enforcement Section	407

TELEPHONE NO. (*Include Area Code*)
919-732-9826

STREET ADDRESS	CITY, STATE, AND ZIP CODE
Route 6, PO Box 412	Hillsborough, N.C. 27278

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

_X_ RACE(B) ___ COLOR ___ SEX ___ RELIGION
___ NATIONAL ORIGIN ___ AGE _X_ RETALIATION
___ OTHER *(Specify)*

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, year)*

October 17, 1988

THE PARTICULARS ARE *(If additional space is needed, attached [sic] extra sheet(s)):*

I. On October 17, 1988, I was denied a lateral transfer to the position of Law Enforcement Officer I which was located in Raleigh, NC. I am currently employed as a Law Enforcement Officer I in Hillsborough, NC.

Respondent employs approximately 407 persons.

II. I have not asked the Division of Motor Vehicles why I was not laterally transferred as stipulated by the State's Superior Court.

According to Respondent's transfer policy, an employee is automatically qualified provided transfer is between classes having comparable qualification requirements.

III. I believe that I have been discriminated against on the basis of my race (Black) and in retaliation for filing EEOC #018860691, #141870562 and #141880012.

___ I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

10-27-88
Date

s/Isaiah Green, Jr.
Charging Party (Signature)

Notary - (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

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STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS
CIVIL RIGHTS DIVISION

July 17, 1989
OAH CHARGE #88-EEO-1304
EEOC CHARGE #141890057

CHARGING PARTY:
Mr. Isaiah Green, Jr.
3222 Holiday Drive
Raleigh, N. C. 27610

vs.

RESPONDENT:
NC Department of Transportation
Division of Motor Vehicles
1 South Wilmington Street
Raleigh, N.C. 27611

Re: Notice of Determination

Dear Mr. Green:

Under the authority vested in me by this agency's procedural regulations, I issue, on behalf of the Office of Administrative Hearings, the following Determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act.

The Respondent is an employer within the meaning of Title VII and all timeliness, jurisdictional and deferral requirements have been met. Charging Party alleges that he was discriminated against in violation of Title VII of the Civil Rights Act, as amended, by being denied a lateral transfer because of his race (Black) and in retaliation for having filed a previous charge. Examination of the evidence

indicates that there is no reasonable cause to believe that this allegation is true. No determination is made as to any other issues which might be construed as having been raised by this charge.

This Determination concludes this agency's processing of your employment discrimination charge. You are advised that you may appeal our Determination in your charge to EEOC in Raleigh (856-4064) within fifteen (15) days of the receipt of this letter. Our investigative files will be forwarded to the EEOC office referenced above.

If you should have any questions concerning our Determination of the merits of your charge, please contact Ms. Paula Richardson at 733-0431.

On Behalf of the
Office of Administrative Hearings

s/Edward T. Smith
Edward T. Smith, Director
Civil Rights Division

RALEIGH AREA OFFICE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
127 W. HARGETT ST., SUITE 500
RALEIGH, N.C. 27601

EEOC CHARGE NO.: 141870562
OAH CHARGE NO.: 87-EEO-0184

CHARGING PARTY:
Mr. Isaiah Green, Jr.
3222 Holiday Drive
Raleigh, N. C. 27610

vs.

RESPONDENT:
N.C. Department of Transportation
Highway Building
1 South Wilmington Street
Raleigh, N. C. 27611

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded the findings of the North Carolina Office of Administrative Hearings.

Having examined the North Carolina Office of Administrative Hearing's findings and the record presented, I conclude that there is not reasonable cause to believe the charge is true.

This concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private lawsuit in Federal District Court within 90 days of receipt of this Decision (please refer to the enclosed information Sheet on Filing Suit in Federal Court).

Unless the Commission receives notification that the Charging Party has filed suit in Federal District Court, the case file will be destroyed one (1) year after the date of this letter in accordance with the Commission's records disposition procedures.

On Behalf of the Commission:

3-9-90
Date

s/Richard E. Walz
Richard E. Walz, Director
Raleigh Area Office

Enclosures: Copy of the Charge
Information Sheet on Filing Suit in Federal Court

RALEIGH AREA OFFICE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
127 W. HARGETT ST., SUITE 500
RALEIGH, N.C. 27601

EEOC CHARGE NO.: 141890057
OAH CHARGE NO.: 88-EEO-1304

CHARGING PARTY:
Mr. Isaiah Green, Jr.
3222 Holiday Drive
Raleigh, N. C. 27610

vs.

RESPONDENT:
N.C. Department of Transportation
Division of Motor Vehicles
1 South Wilmington Street
Raleigh, N.C. 27611

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded the findings of the North Carolina Office of Administrative Hearings.

Having examined the North Carolina Office of Administrative Hearing's findings and the record presented, I conclude that there is not reasonable cause to believe the charge is true.

This concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private lawsuit in Federal District Court within 90 days of receipt of the Decision (please refer to the enclosed information Sheet on Filing Suit in Federal Court).

Unless the Commission receives notification that the Charging Party has filed suit in Federal District Court, the case file will be destroyed one (1) year after the date of this letter in accordance with the Commission's records disposition procedures.

On Behalf of the Commission:

3-9-90
Date

s/Richard E. Walz
Richard E. Walz, Director
Raleigh Area Office

Enclosures: Copy of the Charge
Information Sheet on Filing
Suit in Federal Court

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF NORTH CAROLINA

ISAIAH GREEN, JR.

SUMMONS IN A CIVIL ACTION

V. CASE NUMBER:

N.C. DEPARTMENT OF
TRANSPORTATION DIVISION OF
MOTOR VEHICLES

TO: (Name and Address of Defendant)

N.C. Department of Transportation
Divison of Motor Vehicles

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

David M. Dansby, Jr.
P. O. Box 21746
Greensboro, N.C. 27420

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

_____

_____

CLERK DATE

_____

BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

ISAIAH GREEN, JR.,	)	
	)	
Plaintiff,	)	
	)	COMPLAINT
-vs-	)	
	)	CIVIL ACTION
	)	NO. 2 90 CV 289
N.C. DEPARTMENT OF	)	
TRANSPORTATION DIVISION	)	
OF MOTOR VEHICLES,	)	
	)	
Defendant.	)	

FIRST CLAIM FOR RELIEF

1.

Jurisdiction is invoked pursuant to 28 USC, Sections 1331, 1343, and 2201. This is an action in equity authorized and instituted pursuant to Title VII of the Act known as "The Civil Rights Act of 1964" 42 USC Section 2000e, et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by Title VII of the Act known as "The Civil Rights Act of 1964", 42 USC, Section 2000e, et seq., providing for injunctive or other relief against racial discrimination in employment. The suit also is authorized under Title 42 USC, Sections 1981

and 1983 and the United States Constitution - more particularly the Fifth and Fourteenth Amendments thereto.

2.

This is a proceeding for a permanent injunction restraining the Defendant from maintaining a policy practice, custom and usage of withholding or attempting to withhold or deny and depriving or attempting to deprive the Plaintiff and members of his class of employment opportunities and rights solely on the ground of race and color. This is also a proceeding for monetay [sic] damages for the deprivation of the Civil Rights of the Plaintiff.

3.

That the Plaintiff is a Black male citizen of the United States and a resident of Raleigh in the State of North Carolina. The Plaintiff is an employee of the Defendant, North Carolina Department of Transportation.

4.

That the Defendant, N.C. Department of Transportation, is a division and agency of the State of North Carolina. That the Defendant maintains offices in Greensboro, Hillsborough, in Raleigh, and in most counties in the State and employs in excess of four hundred persons.

5.

That the Plaintiff was initially hired by the Defendant in June of 1981 as a Law Enforcement Officer.

6.

That the Plaintiff was denied a merit increase eventhough all of the white employees employed in Defendant's Greensboro, North Carolina facility received fifty percent of a step merit increases and the other Black person in the Greensboro facility received twenty-five percent of a step increase eventhough all parties received an "acceptable" rating.

7.

The Plaintiff and other Blacks are discriminated against as a class in pay and that December 11, 1986, the Plaintiff has been paid unequal wages in comparison to his white counterparts.

8.

That the Plaintiff was initially hired at an annual pay rate of $26,692.00 eventhough a white with less experience was hired at an initial annual pay rate of $31,000.00.

9.

On October 8, 1986, the plaintiff was denied a lateral transfer from the Hillsborough Office to the Raleigh Office and the position eventhough the Defendant's policy was to grant transfers routinely when there were vacancies and the Plaintiff was denied the transfer which was given to a white, because of his race.

10.

That the Plaintiff filed timely and proper complaints with the Equal Employment Opportunity Commission on March 2, 1987 and on October 27, 1988, alleging denied by Defendant of his rights under Title VII of the Civil Rights Act of 1964, 42 USC, Section 2000e, et. seq. On March 9, 1990, the Plaintiff received a Notice of Right To Sue.

SECOND CLAIM FOR RELIEF
(Retaliation)

11.

That on October 17, 1988, the Plaintiff was denied a requested lateral transfer to a position in Raleigh, North Carolina, eventhough the Defendant had been ordered by the North Carolina Superior Court to grant the Plaintiff the lateral transfer.

12.

That the failure to transfer the Plaintiff was in retaliation for charges the Plaintiff had filed with the Equal Employment Opportunity Commission on March 2, 1987, October 5, 1987 and Equal Employment Opportunity Commission Charge No. 01886091.

THIRD CLAIM FOR RELIEF
(Denial Of Transfers)

13.

That the actions of the Defendant in denying the Plaintiff's requested transfers violated the Plaintiff's rights under 42 USC 1981, 42 USC 1983, and 42 USC 2000e, et seq.

14.

That the actions were done under color of law, customs and usuage [sic].

15.

That the denial of the transfers caused the Plaintiff to have to drive long distances to his place of employment in Greensboro and Hillsborough at great expense to the Plaintiff.

FOURTH CLAIM FOR RELIEF
(1981, 1983 Claims)

16.

That the denial has caused the Plaintiff emotional and mental anguish.

17.

That the plaintiff is entitled to back pay to make up for the pay differential with interest.

18.

That the actions of the Defendant were malicious and willfully done with the knowledge that the actions would harm the Plaintiff economically and emotionally.

FIFTH CLAIM FOR RELIEF
(Intentional Infliction of Mental Anguish
- State Cause of Action)

19.

That the Defendant willfully and intentionally refused to give the Plaintiff a lateral transfer and willfully and intentionally refused to pay the Plaintiff wages and salary comparable to that paid white employees and such willful conduct on the part of the Defendant was either willful, deliberate and purposefully calculated to cause the Plaintiff mental anguish or the said conduct was in reckless disregard of the consequences with full knowledge that the great emotional and mental anguish would be caused the Plaintiff as a result thereof.

20.

That the Plaintiff in fact suffered great emotional and mental anguish.

WHEREFORE, the Plaintiff prays the Court:

1. That a permanent injunction issue enjoining the defendant, its agents, successors, and employees, from continuing or maintaining the policy, practice, custom and

usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the Plaintiff's rights to equal pay and equal treatment in his employment.

2. That the Plaintiff be awarded back pay including all wages and wage differentials occasioned by the denial of equal pay, including interest and cost of living adjustments.

3. That the court take pendant jurisdiction of the other actions including the State Cause of Action.

4. That the Plaintiff recover compensatory damages in the amount of $20,000.00 for the denial of the Plaintiff's constitutional rights to equal treatment in employment and the Plaintiff's right to equal pay.

5. That the plaintiff be awarded punitive damage in the amount of $20,000.00.

6. That the Plaintiff be awarded costs, including reasonable attorneys fees and other additional relief as may appear to the Court equitable and just.

7. That a Jury Trial be granted on all issues.

s/David M. Dansby, Jr.
David M. Dansby, Jr.
Attorney For Plaintiff
P.O. Box 21746
Greensboro, N.C. 27420
Telephone: (919) 274-3785
N.C. Bar 1079

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Isaiah Green, Jr., Plaintiff-Appellant,	)	
v.	)	No. 92-1933
North Carolina Department of Transportation, Division of Motor Vehicles, Defendant-Appellee.	)	

PETITION FOR REHEARING (FRAP 40)
SUGGESTION FOR REHEARING IN BANC (FRAP 35)

Comes now Plaintiff-Appellant, by and through his undersigned attorney, and respectfully petitions this Court for a Rehearing under FRAP 40, or Suggests a Rehearing In Banc of the Decision in the above-captioned Case No. 92-1933.

INTRODUCTION

Plaintiff-Appellant, as a basis for this petition and suggestion, respectfully shows the Court that several material facts were overlooked in the decision which was rendered on May 18, 1993, by this Court.

BRIEF STATEMENT OF THE CASE

The Middle District Court of North Carolina on June 21, 1992, granted a Rule 56 Summary Judgment in this Title VII claim on July 21, 1992. This Court adopted the District Court's Judgment without comment on May 18, 1993. Plaintiff-Appellant herewith timely files his Petition for Rehearing In Banc.

ARGUMENT

The District Court made several erroneous statements of fact in its judgment. These errors were apparently adopted by this Court in its Per Curiam Opinion. If these errors are not corrected, a terrible injustice will have been permitted by our Courts against Plaintiff-Appellant, and discriminatory practices will continue unabated in an important state agency in North Carolina.

The District Court, in its judgment, analyzed three separate issues of alleged race discrimination against Plaintiff-Appellant in the Division of Motor Vehicles: (1) Granting of Merit Raises in the Greensboro DMV Office in 1986; (2) Unfair Hiring Practices and (3) Failure to Transfer. The District Court analyzed each of these issues. Its Summary Judgment analysis overlooked critical facts in the Merit Raise Issue and the Transfer Issue which would have clearly met the prima facie test and made the factual issues in dispute, thereby placing this case in a trial posture.

A. Facts Overlooked in Merit Raise Issue

The District Court Judgment said: "Simply put, there is no basis in fact for plaintiff's allegations" regarding racial disparities in the Granting of Merit Raises in the Greensboro DMV Office in 1986. The facts before the Court, when it made that statement were these: there were two African Americans and five white DMV inspectors at that facility in 1986. Merit increases cannot be granted to Inspectors who have worked less than one year. Merit increases in 1986 were granted per the following chart:

1986 MERIT INCREASES AT
GREENSBORO DMV FACILITY

NAME	ELIGIBILITY FOR MERIT INCREASE	RACE	STEP INCREASE
I. Green	yes	B	0
A. Everette	yes	B	1/4
C. Wesson	yes	W	1/2
J. Turney	yes	W	1/2
W. Emerson	yes	W	1/2
R. Mann	no	W	0
G. Tutterow	no	W	0

Plaintiff (Black) received no merit increase. Alfonzo Everette, the other Black Inspector, received 1/4th step increase. Plaintiff and Everette had been employed in the department for at least 5 years. Compare these to the white inspectors: the three white inspectors who had been in the department for more than two years all received 1/2 step merit increases. The two white inspectors, Mann and

Tutterow, cited by the District Court as "comparables," were both ineligible for increases since they had not achieved the requisite "permanent status" by July 1, 1986, when the merit increases were awarded.

These facts were overlooked below. This racial disparity obviously meets the prima facie test, and Plaintiff Appellant should have his day in court to prove that there was racial and/or retaliatory intent behind his not receiving the same merit increase that the only three comparable white inspectors received.

Facts Overlooked in Discriminatory Transfer Decisions

It is unnecessary to show all of the overlooked facts which were in heated dispute in the court below regarding the alleged discriminatory transfer personnel decision. Here, it suffices to focus on just one of the allegedly discriminatory transfer decisions, which the District Court referee [sic] to in its Judgment as "(1) the Department's hiring of Bristle to fill a newly created LEO position for the Emissions Inspection Program in Raleigh in February, 1986." District Court Judgment, p.10.

The Court stated that Bristle was a "non-minority," with no prior state experience. The Court stated that Bristle "came to this post with a Bachelor of Arts Degree and Master of Arts degree in criminal justice and twelve years of law enforcement experience." The Court further found that "the Office of Administrative Hearings made a ruling in plaintiff's favor, but the EEOC declined to do so, finding that there was no just cause for the charge."

The District Court overlooked at least a score of facts which had been found by a North Carolina Office of Administrative Hearings Administrative Law Judge; by the North Carolina State Personnel Commission; and the Superior Court of Wake County, North Carolina, Judge Craig Ellis presiding. These facts were found after a full Due Process Hearing and review of all of the sworn testimony (subject to cross examination).* None of these facts were ever disputed by the EEOC, which made a non-evidentiary, non-preclusive no cause finding in August 22, 1986.

B. Facts Overlooked in Discriminatory Transfer Decisions

It is unnecessary to show all of the overlooked facts which were in heated dispute in the court below regarding the alleged discriminatory transfer personnel decision. Here, it suffices to focus on just one of the allegedly discriminatory transfer decisions, which the District Court referee [sic] to in its Judgment as "(1) the Department's hiring of Bristle to fill a newly created LEO position for the Emissions Inspection Program in Raleigh in February, 1986." District Court Judgment, p.10.

The Court stated that Bristle was a "non-minority," with no prior state experience. The Court stated that Bristle "came to this post with a Bachelor of Arts Degree and Master of Arts degree in criminal justice and twelve years of law enforcement experience." The Court further found that "the Office of Administrative Hearings made a ruling in plaintiff's favor, but the EEOC declined to do so, finding that there was no just cause for the charge."

The District Court overlooked at least a score of facts which had been found by a North Carolina Office of Administrative Hearings Administrative Law Judge; by the North Carolina State Personnel Commission; and the Superior Court of Wake County, North Carolina, Judge Craig Ellis presiding. These facts were found after a full Due Process Hearing and review of all of the sworn testimony (subject to cross examination).[1] None of these facts were ever disputed by the EEOC, which made a non-evidentiary, non-preclusive no cause finding in August 22, 1986, four days before the Administrative Law Judge held a full, due process hearing, which was the basis of these three quasi-judicial, administrative and judicial findings.

Title VII provides that when a state agency has made "final findings and Orders" prior to an EEOC reasonable cause determination, the EEOC "shall accord [therein] substantial weight" in making its decision. 42 U.S.C. Sect. 2000e-5(b) (1982).

Here are some of the facts, numbered and quoted from the state agency's findings ("Recommended Decision,"

---

[1] Although it has not been raised by either side below, and not by Plaintiff-Appellant, acting pro se, before the three-judge panel which first reviewed this case at this Court, Plaintiff-Appellant has a strong case for Preclusion, in that, contrary to Mr. Kremer in Kremer v. Chemical Construction Corp., 4556 [sic] U.S. 461 (1982), Mr. Greene won a difficult race discrimination finding before a State agency which was subsequently affirmed by a State Court. Applying Kremer here would result in these findings having preclusive effect in this Title VII case, and certainly would preclude a Federal Court from denying these findings of fact at the Summary Judgment stage of litigation.

October 24, 1986, Exhibit to Plaintiff's Memorandum in Opposition to Motion for Summary Judgment), which were so overlooked:

1. Mr. Isaiah Green Jr., is employed as a Law Enforcement Officer I (LEO I) with the Division of Motor Vehicles. At the time of this appeal Petitioner [Green] had thirteen (13) years of continuous state service [in 1986.]

3. [Green] is a Black Male who meets the Respondent's qualifications/requirements for the position of LEO I, which he has filled since January 1, 1985.

6. Since being promoted to the LEO I position, the Petitioner's work performance has been rated by his superiors as "overall acceptable" with commendation for participation in the Theft Investigation Program noted on his Work Planning/Performance Review form for the period July 1, 1985, to June 30, 1986.

9. Prior to joining Respondent [DMV] the Petitioner had 10 years of service as a Trooper with the State Highway Patrol which included 960 hours of training at the UNC-CH Institute of Government. Petitioner is a high school graduate and a Certified Law Enforcement Officer.

14. On November 27, 1985 the Respondent by job posting sought applicants for a LEO I position in Wake County.

15. Petitioner applied verbally and in writing for the LEO I position in Wake County and requested a lateral transfer from Orange to Wake County.

16. Donald Stahl, Respondent's Director of Enforcement, advised Petitioner that his request was being considered, but that the subject position would likely be filled by a new hire.

17. Petitioner was not interviewed for the LEO I position in Wake County. Wake County has never had a Black Male serve in a LEO I position. Of 114 LEO I positions in North Carolina, no more than six are filled by Blacks.

18. Respondent employed Emanuel C. Bristle, a White Male, in the position. Bristle was living in Jefferson, North Carolina, when he applied, and wanted to be assigned to Union County, North Carolina.

19. Director Stahl testified that he recommended Bristle's employment based upon information received that Bristle was a college graduate with a master's degree in public administration who had served thirteen years as a policeman in New York with experience in stolen vehicle investigations. Stahl said he wanted Bristle in Wake County because it has a large number of stolen vehicles. Stahl sat in on the interview of Bristle, but did not participate in or conduct it.

20. Respondent filled nine other LEO I positions along with Bristle's, two being females (including 1 Black

Female in Wake County) and seven other white males. The position filled by a Black female was new and not the seat sought by Petitioner, as its beginning salary was much below his current pay.

23. Respondent's officials have not approved Petitioner's repeated requests for a lateral transfer to Wake County so he can continue to reside with his family in Raleigh and not be required to move them to Hillsborough.

27. Respondent's posted qualifications for the subject position were: Graduation from high school and five (5) years of law enforcement or investigative experience; or an equivalent combination of training and experience. Certified Law Enforcement Officer. Involves enforcement of state law and regulations relating to the operation and sale of motor vehicles, laws pertaining to registration, weight, licensing of dealers and manufacturers, theft investigation, liability insurance inspections and the collection of licensing fees. "Recommended Decision," supra.

The District Court further overlooked the Conclusions of Law of the state agency, adopted by the state court, which addressed both the prima facie burden, and the much greater burden of showing discrimination on Petitioner in this same set of facts. The state court of North Carolina upheld the following critical findings:

. . . Petitioner has shown the following:

-that he is a member of a protected class (minority)
-that Respondent was recruiting to fill the vacant LEO I position in Wake County;
-that he applied for the vacant position which he was qualified for and requested a lateral transfer to Wake County;
-that a white person was selected over him.

. . . The Respondent has not clearly articulated legitimate nondiscriminatory reasons for its denial of Petitioner's request for a lateral transfer to Wake County. Donald Stahl testified that he recommended Emanuel C. Bristle because he was a college graduate with a master's degree in public administration who had severed [sic] thirteen years as a policeman in New York with experience in stolen vehicle investigations while Petitioner had only a high school diploma with limited stolen vehicle investigations. Stahl only sat in on Bristle's interview and Petitioner was not even afforded an opportunity to be interviewed by those conducting same. No details were presented as to the interviews or criteria used before recommendations were made to the Commissioner. No college records or transcripts were presented, nor records detailing the work of Petitioner and Bristle in the area of stolen vehicle investigations, except that Petitioner had been commended by his superiors for participation in its theft investigation program and also received a performance salary increase on August 1, 1985.

. . . Even if one were to conclude that Respondent has clearly articulated legitimate nondiscriminatory reasons for its action, it is concluded that the Petitioner has shown

that the stated reasons were, in fact, a pretext for discrimination. Director Stahl testified that of 114 LEO I's across North Carolina, only 5 or 6 are Black. He also stated that of 10 positions filled at the time of Bristle's, 8 were white males, 1 white female, 1 Black female in an entry level position for which Petitioner was not considered, and no Black males. Also, no Black male has ever filled a LEO I position in Wake County." "Recommended Decision."

The Court below dismisses these adjudicated facts and legal conclusions by saying that "while plaintiff may have been qualified for this LEO I position, a reasonable person could readily have decided that Bristle's educational and investigative qualifications were preferable to those of plaintiff. The Court finds that the Department's proffered justification for choosing Bristle over plaintiff on this basis is valid, reasonable and does not give rise to an inference of discriminatory intent. Consequently, since plaintiff cannot establish a prima facie case either through direct evidence of discrimination or indirect evidence that would support a reasonable probability that plaintiff would have been transferred but for his race, his claim must fail." p.11

The District Court misconstrues this Court's clear holding in Mallory v. Booth Refrigeration Supply Co., Inc., 882F 2d [sic] 908 (4th Cir. 1989). There, this Court set aside the "somewhat less exacting . . . formulation" (Id. n.1, p. 910) it had adopted in Holmes v. Bevilacqua, 794 F. 2d 12421, [sic] 147 (4th Cir. 1986) which was overruled by Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2378, (1989).

Here, contrary to the District Court's statement--adopted by this Court--that "plaintiff cannot establish a prima facie case," Plaintiff has clearly met the prima facie hurdle. Patterson and Mallory state that the elements of a prima facie case are: "[the employee] need only prove by a preponderance of the evidence that she applied for and was qualified for an available position, that she was rejected, and that after she was rejected respondent either continued to seek applicants for the position, or, as is alleged here, filled the position with a white employee." Mallory, supra. n. 1, p.910.

Having misconstrued the prima facie burden, the District Court then goes on, in a summary judgment, to rule that there was insufficient evidence to support a "reasonable probability" that plaintiff would have been transferred but for his race. The Court ignores the devastating statistics which persuaded three fact-finders who heard or studied direct testimony with cross-examination that the agency had:

(a) Only 5 or 6 Black LEO I officers out of 114 in the State.

(b) Had never had a Black man serve as an LEO I in Wake County.

(c) Had not even interviewed Plaintiff-Appellant for the vacant LEO I position, despite the fact that the Agency had encouraged him to exchange duties with the understanding that he would try to get transferred back to his home county of Wake at the next opportunity.

(d) Of 10 positions filled at the time of Bristle's hiring, 8 were white males, 1 was a white female, and [sic] was a black female to an entry level position.

The Court below had several genuine issues as to the material fact of whether there were racial motives behind the DMV's failure to transfer Plaintiff-Appellant, its failure to give him merit raises, and the other discriminatory decisions before it. The Court ignored the State Court Findings, which have preclusive effect under Kremer v. Chemical Construction Corp. 456 U.S. 461 (1982), and overlooked the abundant facts in the record which meet not only Plaintiff-Appellant's prima facie burden but also his final burden--at least in the eyes of the Superior Court of Wake County, North Carolina--in one of the critical issues in the case.

C. Proper Standard for Summary Judgment in Employment Discrimination Case

"[Summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FRCP 56 (c).

The mission of this procedure is to "assess the proof in order to see whether there is a genuine need for trial." FRCP 56 Notes of Advisory Committee on Rule 56, 1963 Amendment. Summary judgment is not appropriate where there is a genuine issue of the credibility of a witness.

Here, there is abundant evidence in the record that the North Carolina Division of Motor Vehicles had a miserable record of employing Black LEO 1's, and of giving merit raises to Black LEO 1's. There were no legitimate business reasons given in the due process hearing below for hiring an outside white person instead of transferring Plaintiff-Appellant to the Raleigh office in early 1986.

The Court below mistakenly included two white males who were ineligible for merit raises (they had not yet completed their probationary period when merit raises were granted), which was the only defense on the record for the disparate treatment of granting no or minimum merit raises to the only two Black LEO 1's, while granting the full merit increase to every white LEO 1 who was qualified.

Genuine, stark issues of fact exist in the two prima facie disparate treatments discussed here. There are similar genuine issues of facts in the other discriminatory personnel decisions in this case which were also overlooked below.

Prima facie cases have been made in the two issues discussed here. If the Court, however, believes that legitimate non-racial reasons have been proffered for the personnel decisions under scrutiny, then it must permit Plaintiff-Appellant the opportunity to show that these "legitimate reasons" are pretextual, and that the real reason for the disparate treatment is racial prejudice and retaliation.

The Administrative Law Judge below observed the demeanor of Mr. Stahl. He noted that "no details were presented as to the interviews or criteria used before recom-

mendations were made to the Commissioner." He noted that "no college records or transcripts were presented, nor records detailing the work of Petitioner and Bristle in the area of stolen vehicle investigations." "Recommended Decision" supra, p.5.

In short, a trained trial judge weighed the demeanor of a key witness, and found it lacking. He weighed the non-submission of graduate degrees in Public Administration for a white male who had worked 13 years as a New York police officer and was now applying for a LEO 1 which only required a High School Degree, and he apparently did not believe the whole story.

These facts, including the fact of an Administrative Judge and a State Court Judge finding race discrimination by the agency against Plaintiff-Appellant, are in the record.

In making a summary judgment, the Court must both predict the facts which will be in the trial record and weigh their sufficiency. Here, the prediction is made easier by the detailed findings of the state court below, which has reviewed the full record of a due process hearing. These facts, as they stand, are sufficient to meet precisely the same burden of proof in a hearing below.

These facts are obviously sufficient to meet the much lower standards of summary judgment, where the motion is defeated if there are any genuine issues. Here there are numerous genuine issues, including whether Bristle has a Master's Degree? There has been no proof, and the state court and the findings it affirmed seem to have some doubt.

Furthermore, what was the Master's in, if he has it? Public Administration, as Mr. Stahl testified? Or "criminal justice" as the District Court wrote? Even if Bristle was better qualified than Plaintiff-Appellant, why did Mr. Stahl put Bristle in the one position open in Raleigh, which Plaintiff-Appellant had requested, and not in one of the seven other LEO 1 positions which were open at the same time? Was it because there had never been any Blacks at the Raleigh DMV office, or because Mr. Bristle had an outstanding record on car thefts? Did Mr. Bristle actually have an outstanding record on car thefts?

"Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate." FRCP 56, Notes, 1963 Amendment.

Here, given the rare history of a full due process hearing and a finding in state court of discrimination in one of the key issues in the case before this Court, summary judgment must be reversed and a trial ordered.

PRAYER

Therefore, Plaintiff-Appellant respectfully petitions this Court for Rehearing, pursuant to FRAP 40, or, in the alternative, suggests for a Rehearing In Banc, pursuant to FRAP 35.

Further, Plaintiff-Appellant respectfully moves that the Summary Judgment of the District Court in Case No. 92-1933 be reversed, and that a trial on the merits be held.

Plaintiff-Appellant, who represented himself in the original appeal to this Court, is now represented by the undersigned counsel.

This the 27th day of May, 1993.

s/Alan McSurely
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Attorney for Plaintiff-Appellant

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CERTIFICATE OF SERVICE

I, Alan McSurely, hereby certify that the foregoing Plaintiff-Appellant's Petitioner for Rehearing and Suggestion for Rehearing In Banc has been served on the Defendant-Appellee by deposing [sic] a copy of same in the United States Mail, first-class postage prepaid, addressed as follows:

Harold Franklin Askins
Assistant Attorney General
North Carolina Department of Justice
P. O. Box 629
Raleigh, NC 27602-0629

This the 28th day of May, 1993.

s/Alan McSurely
Alan McSurely